

TAMIL NADU ELECTRICITY REGULATORY COMMISSION
(Constituted under section 82 (1) of the Electricity Act, 2003)
(Central Act 36 of 2003)

PRESENT:

ThiruM.Chandrasekar

.... Chairman

and

Thiru.K.Venkatasamy

.... Member (Legal)

D.R.P. No.66 of 2014

Samalpatti Power Company Private Limited
No.14, 1st Floor, SreyasVirat
Third Cross Street
Raja AnnamalaiPuram
Chennai – 600 028.

... Petitioner
(ThiruRahul Balaji
Advocate for the Petitioner)

Vs.

1. Tamil Nadu Generation and Distribution Corporation Limited
144, Anna Salai,
Chennai 600 002.

...Respondent
(ThiruM.Gopinathan,
Standing Counsel for TANGEDCO)

2. State Load Dispatch Centre
C/o. Tamil Nadu Transmission Corporation Limited
144, Anna Salai
Chennai – 600 002.

.... Respondent
(ThiruV.Anil Kumar
Advocate for SLDC)

**Dates of hearing : 30-07-2014; 17-09-2019; 15-10-2019;
26-11-2019; 11-02-2020; 24-11-2020;
08-12-2020;29-12-2020; 19-01-2021;
01-02-2021;and 03-02-2021**

Date of Order : 15-04-2021

The DRP No. 66 of 2014 came up for final hearing on 03-02-2021. The Commission upon perusing the affidavit filed by the petitioner, counter affidavit filed by the respondent and all other connected records and after hearing both the parties passes the following:-

ORDER

1. Prayer of the Petitioner in D.R.P.No.66of 2014:-

The prayer of the petitioner in D.R.P. No. 66of 2014 is to set aside the action of the 1st respondent in making a deduction of Rs.5,82,71,744/- as evidenced in their letters dated 06-09-2013 and 11-11-2013 and consequently direct payment of the said sum together with interest of Rs.51,22,349/- till 25-06-2014 thereon as set out in the PPA entered into between the parties.

2. Facts of the Case:-

The present petition is being filed by the petitioner to set aside the action of the 1st respondent in making a deduction of Rs.5,82,71,744/- as evidenced in their letters dated 06-09-2013 and 11-11-2013 and consequently direct payment of the said sum together with interest of Rs.51,22,349/- till 25-06-2014 thereon as set out in the PPA entered into between the parties.

3. Contentions of the Petitioner:-

3.1. The petitioner herein is engaged in the generation of electricity and is a "generating company" as defined under section 2 (28) of the Electricity Act, 2003. The petitioner entered into a Power Purchase Agreement ("PPA") with the respondent on 22-05-1998 as amended on 19-01-1999 and further amended on 16-

12-1999 for purchase of the entire capacity and energy generated by the power generating station, pursuant to the terms and conditions morefully set out in the PPA. The Petitioner, thereafter, set up a 105.66 Mega Watt(comprising 7 units of 15.094 MW each) power generating station to generate electricity and supply the same to the Respondent. The Petitioner is generating power through an Internal Combustion Engine Power Generation Plant using Low Sulphur Heavy Stock (LSHS) in BargurSipcot Industrial Complex, Parandhapalli Village, Pochampalli Tk., KrishnagiriDistrict. The Petitioner's power generation station achieved Commercial Operation (COD) on 1st March 2001.

3.2. The PPA is a valid and binding contract between the Parties which contains the terms and conditions on which the Petitioner has been supplying Electricity tothe Respondent. The petitioner has already filed a petition which is pending as D.R.P. No. 27 of 2012 in respect of the Zero Dispatch Instructions which are being issued. Prior to July 2012, the 2nd Respondent once in a while used to direct the Petitioner to zero down generation and thereafter based on the technical justification given by the Petitioner, the 2ndRespondent used to direct the Petitioner to restore generation to minimum of 13 MW with one engine. However since August 2012, the 2ndRespondent had been issuing zero power dispatch instructions regularly for adherence by the Petitioner apparently pursuant to the Merit Order Dispatch regime that is notified by the Commission. However, such regime would not alter the obligations of the parties under the PPA. The petitioner is not repeating the submissions in that regard as there are a subject matter of a separate petition. The present petition is concerned with the unilateral deduction of payments by the 1stRespondent which is contrary to the 'pay and dispute" clause of the PPA as also the principle laid down by the Commission and APTEL that 1strespondent, in the

context of payments under the PPA, cannot be a judge in its own cause and make deductions / adjustments unilaterally.

3.3. Under the PPA, the 1st Respondent is the exclusive purchaser of the entire generation of energy. The Petitioner's operation is entirely dependent on the project generating electricity and income stream from the 1st Respondent. The provisions of the PPA are pivoted on the aforesaid commercial principles to ensure smooth operations and therefore Parties negotiated for and ensured that the power plant is in commercial operation at all times and the 1st Respondent had bound itself to not issue part-load dispatch instructions to the petitioner other than as expressly provided in Article 6.3(b) of the PPA. The Petitioner is setting forth the relevant clauses of the PPA for the purpose of the present petition.

“Article 6.3

Dispatch

- (a) The Company shall follow Dispatch Instructions issued in accordance with this Agreement. TNEB shall only issue Dispatch instructions which are in the interest of an integrated grid operation consistent with the Technical Limits and the avoidance of a Project shutdown consistent with the provisions of this Agreement. TNEB shall not issue part-load Dispatch Instructions to the Company other than those expressly provided for in Article 6.3(b). Deemed generation attributable to compliance with Dispatch Instructions shall be calculated by the Company on the basis of the Dispatch Instructions.*
- (b) Except in the event of an Emergency affecting the Grid System;*
 - (i) no Dispatch Instructions shall require the Company to operate the Project:*
 - (1) during the Initial Tariff Year, Stub year and during the first five (5) Tariff Years, at a load below ninety percent (90%) of the Rated Capacity;*
 - (2) during the next succeeding five (5) Tariff Years, at a load below eighty seven point five per cent (87.5%) of Rated Capacity; and*

- (3) *during the next succeeding five (5) Tariff Years, at a load below eighty five per cent (85%) of Rated Capacity.*
- (ii) *There shall be no more than 50 off line dispatch instruction per Unit per Tariff Year which require the company to re-start a Unit after it has been backed down. TNEB shall also pay the Company under a Supplementary Invoice, the Company's reasonable start-up costs for each start-up in excess of ten (10) start-ups per Unit at a start-up charge calculated in according with Appendix L; this clause will have an overriding effect over the dispatch instructions specified in 6.3 (b) (i) subject however to TNEB allowing the Project to achieve PLF of 85%.”*

3.4. As per Article 6.4 (a) of the PPA, the 1st Respondent cannot practice any adverse discrimination against the Petitioner in the exercise of its discretion or authority under the PPA with respect to dispatching the Project. In the event that a lack of system demand or an Emergency requires the Respondents to back down generation from the power plant, Article 6.4 (a) requires that this shall be in accordance with Article 6.3 (b) which requires that the power plant shall operate at a minimum of at least 85% of the Rated Capacity. It would also be relevant to set out Clause 8.3 (d)

“Disputes of PPA - In the event of any dispute as to all or any portion of an invoice, TNEB shall nevertheless pay the full amount of the Invoice when due and may serve a notice on the company that the amount of an invoice is in dispute, in which event the provisions of Article 15 shall be applicable. If the resolution of any Invoice dispute requires the company to reimburse TNEB, the company will pay TNEB interest on the amount to be reimbursed at the rate of interest specified in Article 8.6 to apply to overdue amounts owed by TNEB.”

3.5. It is evident on a reading of the PPA that the 1st respondent is required to pay for the entire output of the Project in accordance with Article 8. As already stated, Power Projects, unlike other businesses, are set up at huge cost and on the basis of assured periodic cash flows. It is precisely for this reason that Article 8.3 (d) specifies that, should the 1st respondent dispute an invoice it shall nevertheless

pay first and thereafter raise a dispute. Given the size of power projects and the stakes involved, uncertainty is required to be removed within reasonable short time frames. It is for this reason that the Petitioner and the 1st Respondent agreed in Article 8.3 (d) that no disputes could be raised beyond a period of 360 days from the Due Date for payment. The aforesaid mechanism had been agreed to between the 1st Respondent and the Petitioner, primarily to ensure the objectives of assured timely cash flows and promptitude, as stated above. Adequate deterrents have also been stipulated for non-promptitude. It is therefore evident that timely cash flows and promptitude of action by the aggrieved party are the essence of the Power Purchase Agreement.

3.6. During the meeting held on 22.11.2011 conducted by the 1st respondent, the Petitioner had informed the 1st Respondent about the technical constraints on continuously operating the plants at NIL generation. The 1st Respondent had also requested the Petitioner to send the proposal for maintaining the plant at NIL generation vide its letter dated 26.11.2011. Based on the above, the petitioner took up the matter of maintaining the plant at Nil generation for longer durations with the OEM, Wartsila

3.7. The OEM recommended vide its letter dated 01-08-2012 and 07-08-2012 stating that the plant has to be operated intermittently for 16 hrs a day with a maximum continuous shutdown period of 4 hrs at a time. The OEM has also suggested installing a package boiler of 4270 kg/hr, if the plant has to be shut down for a continuous period beyond 4 hours. The Petitioner has intimated regarding the above to the 1st respondent vide its letter dated 08-08-2012. But disregarding all

the proposals and alternative suggestions given by the petitioner the 2nd respondent continued to issue zero dispatch instructions for much longer durations and the 1st respondent did not reply to the above proposals submitted by the petitioner.

3.8. The Petitioner had informed the 1st Respondent vide its letters dated 22.06.2012, 28.06.2012, 06.07.2012 and 03.08.2012, that the plant is not designed to handle unplanned stoppages for considerable period in a day and will lead to solidification of fuel and that the 1st Respondent will be fully responsible for all losses on this account. The 1st Respondent was made aware of the difficulties the Petitioner is facing because of the zero power generation instructions being issued by the 2nd Respondent. The Petitioner also brought to the attention of the 1st Respondent the provisions of the PPA wherein the 2nd Respondent needs to issue dispatch instructions at all times to ensure the plant is running at 85% PLF and dispatch instructions are to be issued to avoid plant shut down.

3.9. After making payment towards Invoice dated 11.08.2012, the 1st respondent, vide letter dated 21.02.2013 started communicating higher non-admission with respect to variable cost claim, without explaining the basis for the same. The 1st respondent, vide letter dated 07.06.2013 clarified to the Petitioner that from the billing period 11.07.2012 to 11.8.2012, certain units were disallowed when power was injected into 2nd Respondent's grid during zero dispatch instructions without any details of disallowed units. 1st Respondent intimated units disallowed during zero power dispatch instructions while communicating payment details vide letter dated

28.06.2013 with respect to invoices for the period from 11.01.2013 to 11.02.2013 and continued to issue similar communication while making subsequent payments.

3.10. The 1st respondent vide letter dated 03-08-2013 communicated to the petitioner to issue credit notes for the disallowed units due to zero power dispatch instructions for the invoice period from “July 2012-August 2012” to “February 2013-March 2013” and from April 2013 to June 2013, by placing reliance on the Commission’s Tariff Order dated 20.06.2013 and claiming that that Zero dispatch instructions are within the provisions of the PPA and 1st Respondent has rights to issue Zero dispatch instructions. The Petitioner vide letter dated 12.08.2013 to the 1st Respondent disputed the 1st Respondent's incorrect statement on the Commission’s Tariff Order on Zero power dispatch and clearly stated that there is no basis for their claim to issue Credit note for the disallowed Units on account Zero power dispatch instructions. The 1st respondent vide letter dated 06.09.2013 communicated to the Petitioner stating that an amount of Rs.5,42,57,499/- is deducted from the Tariff Invoice for the billing period 11.7.2013 to 11.8.2013 towards disallowed units by the 1st Respondent as the same was paid along with the concerned Tariff Invoices and also stating that interest relating to the above mentioned amount will be deducted from the subsequent tariff invoice. The Petitioner vide it's letter dated 17.09.2013 strongly protested the deduction of Rs.5,42,57,499/-. The 1st Respondent released payment of Rs.4,53,44,609/- against the Petitioner's Claim of Rs.9,96,02,108/- in the Tariff Invoice for the period 11.07.2013 to 11.08.2013 & the 1st Respondent vide its letter dated 30-09.2013 communicated that total amount of Rs.5,42,57,499/- had been deducted excluding interest for the disallowed units during the period from July 2012 to June

2013 and advised the Petitioner to adjust the amount accordingly. The petitioner communicated vide its letter dated 01.10.2013 to the 1st respondent referring to Article 8.3(d) of the Power Purchase Agreement (PPA) and Article 15 of the PPA and pointed out that such deduction / adjustment was impermissible. The 1st Respondent released payment on 06-11-2013 for the petitioner's tariff invoice dated 11.09.2013 for the period from 11-08-2013 to 11-09-2013 after deducting an amount of Rs.40,14,245/- towards interest for the amount of Rs.5,42,57,499/- and communicated vide 1st respondent's letter dated 11-11-2013 to adjust the amount accordingly.

3.11. The action of the 1st respondent are premised on an incorrect interpretation of the terms of the PPA as also the Tariff Order passed by this Commission, the Tamil Nadu Grid Code and the provisions of the Electricity Act, 2003. A perusal of the Tariff Order reveals that 1st Respondent's claim is contrary to the express terms of such order. The petitioner in its response had specifically pointed out Para 2.219 wherein the Commission has clearly stated that the SLDC, the 2nd Respondent herein, shall be responsible for optimum scheduling and dispatch of electricity within the State in accordance with the contracts entered into with the licensees or the generating companies operating in that State. As a matter of fact, the Commission has specifically noted the pendency of the D.R.P. relating to zero Dispatch instructions and has ordered in para 2.217 that the matters concerned to payment obligations or applicability of Articles of a bilateral PPA are outside the purview of the Tariff petition. The Commission has also recognized that approval for dispatch outside merit order is to be obtained by the 1st Respondent. It is thus evident that the 1st Respondent is resorting to self-serving interpretations.

3.12. The 1st Respondent's unilateral deduction of disputed claims after raising the dispute is not envisaged in the PPA. The petitioner had responded to the 1st respondent's communication regarding disputing of certain tariff invoices raised and disallowing of certain units due to zero dispatch instructions. However, the same has been completely ignored and a unilateral deduction of disputed amount has been made, without following the dispute resolution mechanism provided in the PPA. The deduction, being contrary to the provisions of the PPA, is not tenable. The 1st respondent, in compliance with the provisions of the PPA, started making payments towards invoices raised by the petitioner from 11-06-2011 in full, however specifying the admitted amount which was less than the invoice amount. When it came to the issue of zero power disallowance, the 1st respondent has not only deducted the amount paid towards dispatch during zero power for earlier months, but has also deducted interest with respect to the amount paid. While the 1st respondent has very promptly calculated a purported delayed payment interest which is completely wrong and contravening the provisions of the PPA and has unilaterally deducted this interest amount from the regular tariff invoice payment, but the 1st Respondent denies payment towards interest for the belated payments any time in the past and till date. This clearly highlights the inconsistent and highhanded approach of the 1st Respondent, that too in a case when a DRP is pending before the TNERC on the very same issue of zero power dispatch instructions.

3.13. The petitioner wishes to place on record, an incongruous situation that is prevailing in the State. The Petitioner submits that Sections 31 and 32 of the Electricity Act, 2003 provide that the State Government shall establish a State Load

Despatch Centre(SLDC) which shall be operated by a Government company or any authority or corporation established or constituted by or under any State Act, as may be notified, The proviso to this section clearly highlights that the operation of the State Transmission Utility as the SLDC may only be temporary in nature and is not envisaged as a permanent feature. In the State of Tamil Nadu, it is the TANTRANSCO which is also operating as the SLDC. It is important that the SLDC works independently in the discharge of its statutory functions and there is no conflict of interest. It is for this reason that the SLDC is barred from the activity of trading in electricity. This being the case, the Petitioner submits that the manner in which the scheduling is being conducted in the State is so structured as to benefit the 1st Respondent alone at the expense of entities like the Petitioner.

3.14. The SLDC instead of independently following and complying with the Grid Code & Regulations is acting in conjunction with the 1st Respondent and to the detriment of the Petitioner though it is an independent body, required to be neutral. It is evident that the 1st respondent is also acting under the dictates of the SLDC as its letter dated 01.11.2013 clearly reveals that after making payment for the power dispatched, they have thereafter sought to recover the same under the dictates of the SLDC. The SLDC in terms of the functions set out in the Electricity Act,2003 is unconcerned with the bilateral transactions between the generator and the distribution licensee and its involvement is therefore wholly out of place. This Commission may consider this aspect as well.

3.15. The failure on the part of the 1st Respondent to comply with the provisions of the PPA has adversely affected the financial position of the Petitioner. This has

arisen solely out of the default by the 1st Respondent's breach of its contractual obligations.

3.16. The petitioner in view of the serious nature of the issues being faced by it has no other option but to approach the Commission since all attempts at amicable and informal resolution of the disputes have failed.

4. Counter Affidavit filed on behalf of the 1st Respondent TANGEDCO:-

4.1. The above DRP is devoid of any merits and the same is liable to be dismissed as not maintainable both in law and on facts.

4.2. The Petitioner has filed this DRP No.66 of 2014 seeking refund of a sum of Rs.5.83Crores deducted till 25.06.2014 by the Respondent for not obeying the dispatch instructions of State Load Dispatch Centre for the period from 15.07.2012 to 15.06.2013 along with an interest of Rs.51,22,349/-.

4.3. The Respondent had signed a Power Purchase Agreement (PPA) with the Petitioner on 22.05.1998 for purchase of power from the proposed 105.66 MW diesel engine based power project to be located at Parandapalli Village, Dharmapuri District. The fuel to the project was LSHS, LSWR, LSFO, furnace oil and heavy furnace oil.

4.4. Except in the event of an emergency affecting the Grid System, no dispatch instruction shall require the company to operate the project at a load below 90% for the first 5 years, at a load below 87.5% for the succeeding 5 years and at a load of below 85% of rated capacity.

4.5. The petitioner's power project was put into commercial operation on 01-03-2001 and started supplying power to this respondent with LSHS as fuel.

4.6. The variable cost of the power generated from the Petitioner's power project was Rs.2.15/Kwhr during FY 2001-02 and gradually increased to Rs.11.15/Kwhr during the FY 2012-13. Due to purchase of power at high variable cost from the Petitioner's plant and purchase from similar liquid fuel based power plants (M/s Madurai Power Corporation, M/s GMR Power Corporation & M/s PPN Power Generating Company) the Respondent had to incur huge expenditure towards power purchase cost.

4.7. According to Regulation 75(1) of the TNERC's (Terms and Conditions for Determination of Tariff) Regulation, 2005 the *"Distribution Licensee shall procure power on least cost basis and strictly on Merit Order Despatch and shall have flexibility to procure power from any source in the country"*.

4.8. The fuel used by the Petitioner's plant was LSHS/LSFO. The variable charge for power produced was around Rs.11.15 per unit, which was very much higher than natural gas/coal based power stations.

4.9. The Commission in the Tariff Order No. 1 of 2012 dated 30.03.2012, vide clause 7.1. prescribed the Merit Order Ranking for dispatch of power by TANGEDCO on least cost basis. According to clause 7.1.2.f. of Tariff order, the Commission listed the Petitioner's Power Plant under the list of plants which were not scheduled as per Merit Order Despatch, since the variable cost of the Petitioner's plant was very high. TANGEDCO had perforce to despatch power only from the generators under Merit Order List. As per clause 7.1.20 of the Tariff Order,

Commission allowed only fixed cost for those IPPs which do not get scheduled as per Merit Order Despatch.

4.10. The Commission in the above said Tariff Order in clause 7.1.20 has directed as follows: “ *Further the Commission has allowed only fixed cost for those IPPs which do not get scheduled as per Merit Order Despatch discussed in earlier section. Wherever the Power Stations are to be despatched outside Merit Order, TANGEDCO shall obtain approval of the Commission in advance by furnishing reasons for such action. In case of emergencies TANGEDCO is permitted to resort to such a practice but will approach the Commission within a week of such action along with the reasons for such action.....*”

4.11. As per the above order of the Commission, the Petitioner's power plant shall be maintained at zero power generation and the Petitioner's power plant was eligible for fixed charges alone during the Zero generation. Further, whenever the power plant of the petitioner was to be dispatched to meet out the grid demand, this Respondent was directed by the Commission to obtain prior approval from the Commission or within a week in case of emergency.

4.12. Based on the above Tariff order of the Commission, the Petitioner's plant was given zero dispatch instruction from 01.04.2012 onwards, based on the merit order dispatch by SLDC and during this zero dispatch period, as directed by the Commission, the Petitioner's plant was allowed fixed charges.

4.13. The Respondent had also filed various Miscellaneous Petitions for dispatching the Petitioner's power plant from April 2012 as and when power was required from the Petitioner's power plant judiciously, depending on the grid

conditions. The Commission had also approved to dispatch the Petitioner's plant. Whenever the grid condition did not require dispatch of IPPs outside merit order, the Petitioner's plant was maintained at Zero generation by SLDC as directed by the Commission's Tariff Order dated 30.03.2012 and only fixed charges was paid to the Petitioner's Plant.

4.14. The Petitioner has not obeyed the zero dispatch instructions of SLDC which was issued in line with Merit Order Dispatch instruction of the Commission and continued to generate power and pump the same into the grid. The reason stated by the Petitioner was that it needed steam for keeping the LSHS in liquid condition.

4.15. By violating the SLDC's dispatch instruction, the Petitioner's has generated the following quantum of energy during the FY 2012-13 to FY 2013-14 as tabulated below:

Billing Period	Units
11.07.2012 to 11.08.2012	5,71,950
11.08.2012 to 1.09.2012	23,25,460
11.09.2012 to 11.10.2012	4,45,250
11.10.2012 to 11.11.2012	1,46,250
11.11.2012 to 11.12.2012	71,500
11.12.2012 to 11.01.2013	1,37,583
11.01.2013 to 11.02.2013	2,80,449
11.02.2013 to 11.03.2013	24,917
11.03.2013 to 31.03.2013	0
01.04.2013 to 11.04.2013	0
11.04.2013 to 11.05.2013	1,86,334
11.05.2013 to 11.06.2013	8,74,250
Total	50,63,943

4.16. As per Clause 4.2 of the TNERC Grid Code, 2005, the State Load Despatch Centre (SLDC) shall be the apex body to ensure integrated operation of the power system in a State. It also states that SLDC shall be responsible for optimum scheduling and despatch of electricity within the State, in accordance with the

contracts entered into with the licensees or the generating companies operating in the State and to keep accounts of the quantity of electricity transmitted through the State Grid. The SLDC shall be responsible for carrying out real time operations for Grid control and despatch the electricity within the State through secure and economic operation of the State Grid in accordance with the Grid standards and this Code.

4.17. As per TNERC Grid Code, 2005 & Section 33 (Compliance of directions), the State Load Despatch Centre in a State may give such directions and exercise such supervision and control as may be required for ensuring the integrated grid operations and for achieving the maximum economy and efficiency in the operation of power system in that State. Further it states that every licensee, Generating Company, Generating station, sub-station and any other person connected with the operation of the power system shall comply with the directions issued by the State Load Despatch Centre.

4.18. Clause 10 (1) of TNERC Grid Code, 2005 states as follows:

Clause 10 (1) : Non compliance and disputes- (1) As stipulated under Section 33 (2), (4) and (5) of the Act, every licensee, generating company, generating station, substation and any other person connected with the operation of the power system shall comply with the directions issued by SLDC. If any dispute arises with reference to the quality of electricity or safe, secure and integrated operation of the State Grid or in relation to any direction given by SLDC, it shall be referred to the Commission for decision. Pending decision of the Commission the licensee or the generating company shall comply with the directions of the SLDC.....”

4.19. According to the above provisions of the Commission's Grid Code, if there was any dispute on SLDC's zero despatch instruction, the petitioner must have

obeyed the directions of SLDC first and then they should approach the Commission for relief. But, the Petitioner neither obeyed the zero dispatch instructions of SLDC nor approached the Commission for relief and continued to generate power and pumped into the grid by violating the zero dispatch instruction of SLDC thus endangering the safety of the Grid.

4.20.As per article 32(2)(c) of Electricity Act, 2003, SLDC is the authority to keep accounts of the quantity of electricity transmitted through the State Grid.

4.21.Since, the Petitioner violated the Grid Code, disobeyed the Merit Order Dispatch instructions and supplied power without dispatch instruction of SLDC, SLDC treated this as an unauthorised injection to the State Grid. Hence, SLDC disallowed the energy pumped to the grid, in line with article 33 (1) & (2) of Electricity Act, 2003 and the billing period wise disallowed energy is as below:

Billing Period	Energy disallowed by SLDC in Units
11.07.2012 to 11.08.2012	5,71,950
11.08.2012 to 11.09.2012	23,25,460
11.09.2012 to 11.10.2012	4,45,250
11.10.2012 to 11.11.2012	1,46,250
11.11.2012 to 11.12.2012	71,500
11.12.2012 to 11.01.2013	1,37,583
11.01.2013 to 11.02.2013	2,80,449
11.02.2013 to 11.03.2013	24,917
11.03.2013 to 31.03.2013	0
01.04.2013 to 11.04.2013	0
11.04.2013 to 11.05.2013	1,86,334
11.05.2013 to 11.06.2013	8,74,250
Total	50,63,943

4.22. Since SLDC is the authority to keep accounts of the quantity of electricity transmitted through the State grid and in turn certifies the quantum of energy fed to

the grid by each generator as per section 32 (2) (c) of the Electricity Act, 2003, the Respondent was making monthly tariff invoice payments to the Petitioner's power plant based on the quantum of energy so certified by SLDC. Since, the unauthorized energy fed into the grid by the Petitioner was disallowed by SLDC and not accounted for in the Tariff Billing, the Respondent did not make payment for the disallowed units.

4.23. Clause 8.3 (d) of the PPA relied by the Petitioner that 100% payment should be made first and dispute shall be raised for the disputed amount subsequently is not applicable to the present case. Since, SLDC is the authority to account for the energy fed into the grid as per clause 32 (2) (c) of the Electricity Act, 2003 and based on the certification of SLDC for the energy pumped by the Petitioner, this Respondent had made payment to the Petitioner.

4.24. As per Sections 32 & 33 of Electricity Act 2003, SLDC is the competent authority for energy accounting. The energy injected into the grid as per the dispatch instructions of SLDC was only accounted for Tariff Billing purpose. TANGEDCO is making payment of the monthly invoices based on the energy certified by SLDC. The unauthorized energy fed into the grid disallowed by SLDC is purely in violation of the Commission's Tariff order as well as the Grid code and the same is not accounted for Tariff Billing. The pay and dispute clause, i.e., clause 8.3(d) of PPA, relied by the Petitioner will not apply to the unauthorized energy injected into the grid, which does not form part of Tariff invoice. Further, there is no provision in the PPA for the payment of unauthorized energy injected into the grid.

4.25. The Petitioner has not approached the Commission seeking remedy for clause 7.1.20 of the Tariff Order No. 1 of 2012 dated 30.03.2012, which not been appealed and hence it has attained finality.

4.26. M/s.GMR Power Corporation Limited (another Independent Power Producer supplying power to the Respondent) had filed Appeal No.127 of 2012 before Hon'ble Appellate Tribunal for Electricity at New Delhi, during the year 2012 against the order of the Commission dated 21.06.2012 in M.P.No 11 of 2012, according approval for this Respondent to dispatch the high cost IPPs outside merit order, including M/s GMR. Hon'ble APTEL, New Delhi in its order dated 14.08.2012 had dismissed the appeal observing that M/s GMR should have filed an appeal against the original Tariff Order dated 30.03.2012 and against the order dated 21.06.2012 in M.P.No 11 of 2012, since it was indirectly challenging the Tariff order.

4.27. Against the zero dispatch instructions issued by SLDC as per clause 7.1.20 of the Commission's Tariff order, Tariff Order No. 1 of 2012 dated 30.03.2012, the petitioner has filed a DRP No.27 of 2012 before the Commission. One of the prayers of the Petitioner in the DRP No.27 of 2012 were:

Prayer "to direct the Respondent to not to disallow any energy fed into the grid so long as such supply has been effected when there is no emergency affecting the grid as notified by the State Load Dispatch Centre and consequently make payment in respect of all energy that has been fed into the grid by the Petitioner"

4.28. The petitioner subsequently withdrew DRP No. 27 of 2012 during the hearing held on 14.12.2018 for reasons best known to them. Having withdrawn the substantive D.R.P. challenging the zero despatch and seeking payment for all energy fed into the grid without seeking any liberty, it is not open to the petitioner to seek the same relief in a collateral proceeding.

4.29. The Respondent had filed an application before the Commission on 19-02-2013 for final true-up and approval of Aggregate Revenue Requirement (ARR) for the year 2010-11, provisional true-up and approval of ARR for the year 2011-12 and its Multi Year Tariff petition for 2013-14 to 2015-16. In response to the issues raised by the Petitioner during the hearing on ARR, this Respondent replied that Zero dispatch of power from the Petitioner's power plant was not in violation of the terms of PPA, as per the following provisions of the PPA:

a. Article 12.1.b.2.(ii) (B) "Direct Indian Political Events under Force Majeure" of PPA states, "***the making of***, or any change in interpretation of, any ***Indian Legal Requirements*** after the date hereof adversely affecting the performance by either Party or Contractor of its obligations hereunder or under any of the Financing Agreements or Project documents."

b. Article 1- 'Definitions' of PPA states that "***Legal Requirements*** shall mean all laws, statutes, orders, decrees, injunctions, licenses, permits, approvals, agreements and ***regulations of any Governmental Agency*** having jurisdiction over the matter in question"

c. Article - 1 definitions of PPA states that, "***Governmental Agency of any country*** shall mean such country and any ministry, department, political subdivision, instrumentality, agency, board, utility, corporation, company, entity, ***commission*** or similar person or instrumentality under the direct or indirect control of such country, or any court or governmental arbitrator or other arbitrator whose determination is binding upon the Parties, including any of its states, municipalities, cities and villages and specifically including GOI, GOTN, TNEB."

The Merit Order Ranking notified by this Hon'ble Commission vide para 7.1.20 in Tariff Order No.1 dated 30.03.2012 comes under the Direct Indian Political Event of Force Majeure.

d. **Under Article-12 Force Majeure**, the payment obligation will be as per Article 12.4.a (i) which is as follows:

"..... for Direct Indian Political Event the Project is deemed to be operating at the NPLF and full fixed charge payment shall be paid by TNEB....."

4.30. According to the above provisions of the PPA, the payment obligations to TANGEDCO covers only full Fixed Charge Payment. It is clearly established, that

the “Zero dispatch” is a Force Majeure event as per the articles of PPA described above and as long as fixed charge payment is made by the 1st respondent, it has complied with the PPA.

4.31. Further Article- 12.5. 'Other consequences' of PPA states as follows:

(a) “.....Except as otherwise provided in this Article 12, neither Party shall be responsible or liable for any breach or deemed breach of this Agreement due to its failure or delay in performing its obligations hereunder due to an event of Force Majeure for such period as the event of Force Majeure continues“.....

Since the Respondent had fulfilled its obligation of full payment of fixed charges to the Petitioner during 'zero' dispatch period under Article 12.4 of the PPA, the Petitioner cannot claim any other relief under Article 12.5 of PPA.

4.32. The Commission's views vide para 2.219 of the Tariff Order No. 1 of 2013 dated 20.06.2013 for 'zero' dispatch of the Petitioner's power plant under Merit Order Dispatch (MoD) is as follows:

“MoD for the specific stakeholders viz M/s SPCL (Samalpatti power Company Limited) and M/s MPCL (Madurai power Corporation Limited) has been in vogue from 1st April 2012. No specific violation of PPA has been cited by them and a direction is being sought to follow the PPA. Alternatively a scheme of despatch is proposed. Section 32(2)(a) of E-Act 2003 states that

“The State Load Despatch Centre shall - (a) be responsible for optimum scheduling and despatch of electricity within a State, in accordance with the contracts entered into with the licensees or the generating companies operating in that State;”

There is no merit for any direction from the Commission for following the provisions of law. As and when there is a cause of action, the Petitioner may approach the Commission for specific relief.”

4.33. From the above, it is clear that the 'zero' dispatch instruction issued by SLDC to the Petitioner's power plant under Merit Order Ranking of the Commission's Tariff Order does not amount to violation of the PPA.

4.34. Tamil Nadu Electricity Grid Code dated 10.12.2005 of the Commission states as follows:

“Clause 10 : Non compliance and disputes- (1) As stipulated under Section 33 (2), (4) and (5) of the Act, every licensee, generating company, generating station, substation and any other person connected with the operation of the power system shall comply with the directions issued by SLDC. If any dispute arises with reference to the quality of electricity or safe, secure and integrated operation of the State Grid or in relation to any direction given by SLDC, it shall be referred to the Commission for decision. Pending decision of the Commission the licensee or the generating company shall comply with the directions of the SLDC.....”

4.35. According to the above provisions of the Grid Code of the TNERC, if the Petitioner was aggrieved by Zero power dispatch instructions of SLDC, it ought to have approached the Commission only after obeying the dispatch instructions of SLDC. But, without obeying dispatch instructions of SLDC, this Petitioner has approached the Commission.

4.36. The Tariff Order 1 of 2013 dated 20.06.2013 came into effect from 21.06.2013, whereas the Dispute period represented in this petition covers the period 11.07.2012 to 11.06.2013. Hence, the Tariff Order No 1 of 2013 dated 20.06.2013 is not applicable to this DRP No.66 of 2014 filed by petitioner.

4.37. The Commission in its order dated 23.02.2016 made in P.P.A.P.No.9 of 2013 in the matter of M/s.Kamachi Sponge & Power Corporation Ltd. Vs. TANGEDCO seeking payment for the unauthorized injection of energy to State Grid, dismissed the request and observed as follows:-

“5.10. The State grid is a large network which handles more than 12,000 MW. The State network is connected to National grid and power flow takes place in both directions (import / export). The grid is operated based on the demand and supply. The frequency of the grid is maintained between 49.70 Hz and 50.20 Hz with effect from 05-03-2012 and the frequency band width was changed to 49.9 Hz to 50.5 Hz with effect from 17-01-2014 as per CERC’s directions. Any unauthorized injection or withdrawal of power into or from the grid would impact the safe and economic operation of the grid. Hence such practices are to be curtailed.

.....

5.12. The Commission in its order dated 15-09-2014 made in P.P.A.P.No.1 of 2013 (M/s.Cauvery Power Generation Chennai Pvt. Ltd. Vs. TANGEDCO and others) observed as follows:-

“6.13 While TANTRANSCO is the authority concerned with transmission of electricity, TANGEDCO is concerned with the purchase of electricity from the generators.” “Mere request on the part of the Petitioner to sell the infirm power generated during the period of testing and commissioning to the Respondents will not create an obligation on the part of the Respondent to pay.

6.14. The Commission concludes that the Petitioner is not entitled to claim payment for whatever infirm power injected into the grid by the Petitioner Generator from 17-10-2012 to 25-10-2012 without getting express approval from the TANGEDCO”.

“5.13. Therefore in the present case, the entire energy pumped by the petitioner during the periods 21-10-2011 to 00.00 hours on 16-11-2011, 00.00 hours on 16-11-2011 to 22-11-2011 and 23-11-2011 to 27-11-2011 till meter reading is unauthorized and therefore Commission is not inclined to direct the Respondent to make payment for the unauthorized injection of power by the Petitioner”.

4.38. In the appeal filed by M/s Kamachi Sponge before Hon'ble APTEL, the Hon'ble Tribunal in its order dated 08.05.2017 in Appeal No.120 of 2016 & IA No.272 of 2016 upheld the above order of the Commission and observed as follows:

“para 10 (I)(iv): The Respondent No. 1 had also quoted two more judgements of this Tribunal in Appeal nos. 267 of 2014 and Appeal no. 68 of 2014. In the judgement dated 15.4.2015 in Appeal no. 267 of 2014 this Tribunal has held that the Appellant (M/s Cauvery Power Generation Pvt. Ltd.) is not entitled to claim payment of infirm power injected into the grid without the approval from the Respondent (TANGEDCO) for specific duration as mentioned in the judgement till TANGEDCO conveyed its consent to purchase infirm power. In the judgement dated 30.5.2016 in Appeal no. 68 of 2014 this Tribunal has disallowed the payment by Respondent (TANGEDCO) towards injection of power from COD of the Appellant (M/s OPG Power Generation Pvt. Ltd.) till approval of third party sales by TANTRANSCO as the energy was injected to the grid without the consent/knowledge of the distribution licensee and SLDC. The crux of these two judgments is also that a generator cannot pump electricity into the grid without having consent/ contractual agreement with the distribution licensee and without the approval/scheduling of the power by the SLDC. Injection of such energy by a generator is not entitled for any payments”.

4.39. The Hon'ble Supreme Court in its order dated 15.01.2018 in Civil Appeal No.13335-13336 of 2015 and Civil Appeal No.4417 of 2016 in the matter of M/s OPG Power Vs. TANGEDCO and M/s Cauvery Power Generation respectively, dismissed the civil appeals and directed below:

“Heard the learned counsel appearing for the appellant(s).

We do not find any reason to interfere with the impugned orders dated 29.11.2014 and 15.04.2015 passed by the Appellate Tribunal for Electricity, New Delhi.

In view of this, we find no merit in the appeals. Accordingly, the appeals are dismissed.”

5. Counter affidavit filed on behalf of the 2nd Respondent State Load Despatch Centre:-

5.1. The State Load Despatch Centre is functioning in accordance with the provisions of the Electricity Act, 2003, Indian Electricity Grid Code (IEGC) and Tamil Nadu Electricity Grid Code(TNEGC).

5.2. The Section 32 of Electricity Act, 2003 while dealing with the functions of State Load Despatch Centre provides as follows:

“(1)The State Load Despatch Centre shall be the apex body to ensure integrated operation of the power system in a State.

(2) The State Load Despatch Centre shall-

(a) be responsible for optimum scheduling and despatch of Electricity within a State, in accordance with the contracts entered into with the licensees or the Generating companies operating in that State ;

(b) monitor grid operations;

(c) keep accounts of the quantity of electricity transmitted through the State grid;

(d) exercise supervision and control over the intra-State transmission system; and

(e) be responsible for carrying out real time operations for grid control and despatch of electricity within the State through secure and economic operation of the State grid in accordance with the Grid standards and the State Grid Code.”

(3) The State Load Despatch Centre may levy and collect such fee and charges from the generating companies and licensees engaged in intra-State transmission of electricity as may be specified by the State Commission”.

5.3. The SLDC is functioning as an Apex body and acts accordingly for optimum scheduling and issues dispatch instruction to the grid connected generators time to time on real time operation to ensure Tamil Nadu(TN) Grid security and economic operations. Any instructions issued by the SLDC shall

have to be followed up by the Generators for safeguarding the TN Grid, otherwise maintain the Grid security is not at all possible.

5.4. The activities of SLDC for real-time operation of TN Grid as per Section 33 (Compliance of directions) of the Electricity Act, 2003 provide as follows:

33. (1) The State Load Despatch Centre in a State may give such directions and exercise such supervision and control as may be required for ensuring the integrated grid operations and for achieving the maximum economy and efficiency in the operation of power system in that State.

(2) Every licensee, generating company, generating station, substation and any other person connected with the operation of the power system shall comply with the direction issued by the State Load Despatch Centre under subsection (1).

(3) The State Load Despatch Centre shall comply with the directions of the Regional Load Despatch Centre.

(4) If any dispute arises with reference to the quality of electricity or safe, secure and integrated operation of the State grid or in relation to any direction given under sub-section (1), it shall be referred to the State Commission for decision:

Provided that pending the decision of the State Commission, the direction of the State Load Despatch Centre shall be complied with by the licensee or generating company.

(5) If any licensee, generating company or any other person fails to comply with the directions issued under sub-section(1), he shall be liable to penalty not exceeding rupees five lacs.”

5.5. The SLDC acts and issues such directions, schedule of dispatch instructions, exercise such supervision and control as may be required for ensuring

the integrated grid operation and for achieving the maximum economy and efficiency in the operation of the power system on real-time basis. Therefore, every licensee, generation company, generating station, sub-station and any other person connected with the operation of the power system shall comply with the directions issued by the SLDC.

5.6. The clause 8.4 (iii) and (v) of Tamil Nadu Electricity Grid code (TNEGC) is relevant of SLDC functions and the same is extracted as follows:

8.4 (iii) *“..... the SLDC may direct the generating stations / beneficiaries to increase or decrease their generation/drawal in case of contingencies e.g. overloading of lines /transformers, abnormal voltages, threat to system security. Such directions shall immediately be acted upon “*

8.4 (v) *“All entities shall abide by the concept of frequency linked load dispatch.....*

All generating units of the entities and the licensees shall normally be operated according to the standing frequency linked load dispatch guidelines issued by the SLDC to the extent possible, unless otherwise advised by the SLDC”

According to the above, the SLDC is empowered for issuing schedule/ despatch instructions to the grids connected generators for the secure operation of TN Grid in the interest of economic operation.

5.7. As per section 32 & 33 of Electricity Act 2003 and as per clause 2.7 of IEGC, the SLDC is responsible for the secured and economic operation of grid. It is the responsibility of SLDC to restrict the surplus power into the grid both in the aspects of grid security, economical and reliable operation. Further the clause 4.2.(e) of TEGC stipulates as follows.

“ .. The SLDC shall be responsible for carrying out real time operations for Grid control and dispatch the electricity within the State through secure and economic operation of the state grid in accordance with the grid standards and grid code”

Hence, under the above regulatory commitments and due to increase in grid frequency above the operating level during wind season, load crash/off peak period of winter season etc., the SLDC is issuing back down instructions to the TN Grid connected Generators including petitioner's plant accordingly.

5.8. The Hon'ble Central Electricity Regulatory Commission (CERC) vide notification dated 05.03.2012, has brought stringent measures, for not to underutilize the scheduled power i.e, under drawal is not permitted not more than 250MW at the revised grid operating range of 49.70-50.20 Hz. Hence the regulatory commitment is also there in reducing all the surplus availability whenever the grid conditions warrants.

5.9. In ensuring economic grid operation and complying the directions of the Commission, the measures on making nil generation in petitioner's plant as and when the security of TN grid conditions warrants under merit order despatch. Accordingly, in obeying the directions of the TNERC and as directed by the TANGEDCO, the SLDC is scheduling the high cost power of the petitioner's plant economically and there by the compliance of the regulatory provisions are ensured.

5.10. The averment made by the petitioner vide para(8) is not correct and denied as false based on the following facts;

- a. As per PPA clause 5.1 (a), the Company shall operate the Project in accordance with the Operating Procedures and Dispatch Instructions,

subject to the technical limit. However there is no specific instruction about the quantum of technical limit (or) complete shutdown of the plant in the PPA.

- b. The Petitioner's Generating company is being issued for "0" (zero) MW dispatch instruction whenever grid condition warrants with the condition that if any energy is injected into the grid during the above period, the same would not be accounted. Since the companies brought down their generation to "0" MW for only maximum 8 hours in a day, the energy injected during the "zero" request period was disallowed. After this whenever dispatch instruction for "0" MW is given by the SLDC, irrespective of duration it is being followed by the above companies and come on bar as per schedule without any time lag which clearly indicates that there is no any technical constraints like solidification of LSHS.
- c. The Generating companies were issued "zero" MW request for continuously 959 Hours during 17.07.13 to 26.08.13, they were able to follow the instructions and no untoward incidents had occurred. M/s GMR Power Corporation Ltd with same type of fuel (LSHS) is also being issued "zero" dispatch instruction whenever the grid condition permits and the same is being followed by the company without rising any litigation.

5.11. The averment of petitioner vide para(16) that the pendency of DRP regarding zero despatch instructions quoting the order in para 2.217 of TNERC in the petition which is wrong compared to original order in para 2.217 of TNERC which is reproduced as follows;

"In addition the matters concerned to payment obligations or applicability of Articles of a bilateral PPA are outside the purview of this petition. Hence the Commission decides that the power purchase quantum for the second control period from M/s SPCL and M/s MPCL will continue to be governed by Merit Order Despatch principles."

5.12. The above being part of Determination of Tariff for Generation and Distribution-order dated 20.06.2013 of the Commission, the same is also being followed by the SLDC.

5.13. The SLDC communicated the certified energy details along with disallowance of the above energy in Kwhr to TANGEDCO as per one of the duties and responsibilities of SLDC and the SLDC is a authority for energy accounting as per sections 32 and 33 of Electricity Act 2003 only and hence the averment made by the petitioner that the 1st Respondent is acting under the dictates of the SLDC as its letter dated 01.11.2013 SLDC in terms of the functions set out in the Electricity Act 2003 is unconcerned with the bilateral transactions between the generator and the distribution licensee and its involvement is therefore wholly out of place....” is completely wrong and misleading the Commission.

5.14. The intention of SLDC was to communicate to the 1st Respondent about the facts of “0” (zero) despatch instructions issued to the generator due to safety of TN Grid and the unauthorized energy injected to the Grid for the same for which the SLDC has not permitted the above. The SLDC is empowered to acts according to section32 and 33 of Electricity Act 2003, such codes and regulations issued by Central and State Commissions as provided in the Act for issuing such directions to all generators to safeguard the TN Grid.

5.15. In D.R.P. No. 12 of 2011 filled by M/s OPG Power Generation Pvt. Ltd., the Commission order dated 07.10.2011 has followed the Appellate Tribunal for Electricity (ATE) order dated 16.05.2011 in Appeal No.123 of 2010 in the matter of M/s. Indo Rama Synthetics (I) Ltd., Nagpur Vs

Maharashtra Electricity Regulatory Commission and others. The operative portion of the order of ATE in Para 13 of the order, which is relevant, is reproduced below:

“Thus, we do not find any substance in the claim of the Appellant for compensation for the power injected into the grid without any schedule and agreement.”

5.16. Also the Commission in the D.R.P. No. 12 of 2011 filed by M/s OPG Power Generation Pvt. Ltd., has ordered as follows:-

“No compensation is payable to the petitioner for the energy injected into the grid in the absence of approval of open access. Further no compensation is payable to the petitioner for the energy injected into the grid in the absence of any agreement for sale of power and scheduling of energy for injection into the grid based on such agreement”

5.17. In the present case, also the petitioner had injected energy without any schedule/dispatch instructions, and therefore the unauthorized injection of energy against IEGC shall not be accounted, based on which the SLDC has not accounted the energy injected without schedule by the petitioner's plant.

5.18. The Appellate Tribunal for Electricity in its order dated 16.05.2011 in Appeal No. 123 of 2010 filed by M/s. Indo Rama Synthetics (I) Ltd., Nagpur Vs Maharashtra Electricity Regulatory Commission and others held that any injection, without valid contract and or complying with scheduling requirements as per prevalent procedures for scheduling and dispatch, would not in principle be in the interest of disciplined operations of the grid which is of paramount concern from the perspective of reliable and safe operations of the Grid. If a generator connected to the grid injects power into the grid without a schedule, the same will be consumed in the grid even without the knowledge or consent of the distribution licensees.

However, such injection of power is to be discouraged in the interest of secure and economic operation of the grid.

5.19. Therefore, such illegal injection by generating companies lead to violation of Grid code resulting in exceeds the deviation limit of 250 MW as per CERC notification dated 05.03.2012, causing prejudice in security and management of TN Grid and leading to commercial loss to the licensee due to such illegal injection of power to TN Grid.

5.20. Considering all the above point, the following are submitted for consideration:

- a. The SLDC is acting according to the section 31, 32 and 33 of the Electricity Act, 2003 and performing the following various activities as notified by the CERC & TNERC Codes, Regulations and orders and as amended from time to time.
- b. Optimum scheduling and despatch of electricity within a State in accordance with the contracts entered into with the licensees or the generating Companies operating in that State.
- c. Carrying out real time operation for grid control and despatch of electricity within the State through secure and economic operation of the State Grid in accordance with the IEGC and TNEGC.
- d. Real time functions for balancing the dynamically varying supply and demand at any moment in the interconnected system as per IEGC, 2010. The Vital grid parameters such as frequency, node voltages, transmission line loading, transformer loading, etc. are also monitored round the clock and suitable action is taken in case the values of the above parameters are seen to be outside the permissible bands. The operating band has been specified in the IEGC, approved by the CERC with commercial mechanism.
- e. The grid management function in the SLDC can be segregated into pre-planning, real-time and post-facto functions Post facto functions

involve grid performance reporting, Analysis of events, settlement of accounts i.e energy accounting and data acquisition for the past period. Hence, the Energy injected by the IPPs have to be certified as per the schedule / despatch instructions issued for every month by the SLDC as per the above sections of the Electricity Act, 2003 and it is the duty of SLDC to disallow any unauthorized injection of power to TN Grid while verifying the same.

- f. Accordingly, on energy accounting, the SLDC disallowed the unauthorized energy injected by the petitioner while certifying the energy and intimating the same to TANGEDCO for the following months:

SI No	Period	Disallowed energy injected during "0" (Zero) despatch instruction (in Kwhr)
1	July'12 to Aug'12	5,71,950
2	Aug'12 to Sep'12	23,25,460
3	Sep'12 to Oct'12	4,45,250
4	Oct'12 to Nov'12	1,46,250
5	Nov'12 to Dec'12	71,500
6	Dec'12 to Jan'13	1,37,583
7	Jan'13 to Feb'13	2,80,449
8	Feb'13 to Mar'13	24,917
9	Apr'13 to May'13	1,86,334
10	May'13 to June'13	8,74,250
	Total	50,63,943

5.21. The SLDC has to restrict the TN UI (Unscheduled Interchange) within the limits of 250 MW as per CERC notification dated 05.03.2012, the grid security cannot be maintained at all if all the generators continuously pumping energy to TN Grid over and above contracted quantum/drawal schedule/despatch instructions of SLDC and the licensee to face commercial aspects against violation to the RLDC (SRLDC) and hence even a meagre quantum i.e 1 MW injected by generators by violating SLDC instructions will endanger the TN Grid and results in commercial

implications to the licensee (TANGEDCO). If unauthorized injection is permitted it will result in creation of wrong precedence and result in much more illegal injections.

5.22. The quantum of energy injected into the grid in the absence of scheduling instruction, is unauthorized injection making the generator liable to penal charges. Such injection of unauthorized power by the petitioner is in violation of the Grid Code and the provisions of Electricity Act, 2003. Therefore the State Commission may impose penal charges to the petitioner for the violations committed by the petitioner.

5.23. The details of violations made by the Petitioner's plant M/s SPCL from July 2012 to June 2013 is tabulated below;

Sl. No	Period	No. of Violations made by the petitioner's plant
1	July'12 to Aug'12	5
2	Aug'12 to Sep'12	30
3	Sep'12 to Oct'12	14
4	Oct'12 to Nov'12	6
5	Nov'12 to Dec'12	2
6	Dec'12 to Jan'13	5
7	Jan'13 to Feb'13	10
8	Feb'13 to Mar'13	2
9	Apr'13 to May'13	5
10	May'13 to June'13	7
	Total	86

Total violations made by the petitioner: 86 nos.

Penalty per violations as per section 33(5) of Act 2003: Rs. 5 Lakhs

Total Penal charges: 86 x 5 Lakhs = Rs. 4,30,00,000/-

(OR) say Rs. 4.30Crores

(Rupees Four Crore and thirty lakhs only)

5.24. As such the petitioner having not complied the despatch instructions from SLDC as per section 32 & 33 of Act 2003 and unauthorisedly injected energy to harm the security of the TN Grid and their prayer in the present petition itself is an extended portion of their prayer in their previous petition D.R.P. 27 of 2012 which is pending before the Commission is a violation against the Act, Codes and Regulations of Central and State Commissions and the averment made in this petition against SLDC is a misleading one.

5.25. The petitioner has to pay Rs.5.0 Lakh to SLDC for each and every violation of non-compliance of direction issued by SLDC, to harm and endanger the TN Grid security as per section 33 (5) of the Electricity Act, 2003 which worked out to Rs.4.35 Crores (Rupees Four Crore and thirty five lakhs only) for the total 86 violations made by the petitioner.

5.26. The Commission may be pleased to dismiss the above petition and also to direct the petitioner to pay a sum of Rs.4.30Crores(Rupees Four Crore and thirty lakhs only) for the violation of section 33 of the Electricity Act 2003 and pass such further or other orders as may be deem fit.

6. Rejoinder to the counter affidavit of the 1st Respondent:-

6.1. The present DRP has been filed by the petitioner challenging the arbitrary and illegal action of the respondents in making an illegal recovery of the sums that have been already accepted to be paid and thereafter paid to the petitioner for supply of power. The subsequent unilateral recovery on the ground that the said power was supplied when the 2nd respondent had instructed the petitioner not to dispatch power is wholly impermissible and beyond the powers of the 1st respondent

apart from being illegal. The recovery made by the 1st respondent is clearly contrary to the terms of the Power Purchase Agreement entered into and its reliance on the SLDC's directions and powers is wholly misplaced and its stand with respect that is contrary to the very provision in the statute that it seeks to rely upon.

6.2. As regards the averments made in paragraphs 4 to 12 of the counter affidavit, it is denied that TANGEDCO did not dispatch power outside the merit order as sought to be suggested in para 11. Such claim is contrary to the facts and record. In Para 12, the 2nd respondent has correctly quoted this Commission's order and it is clear that generators can be dispatched outside the merit order and the obligation to obtain regulatory approval is cast on the 1st respondent.

6.3. As regards the averments made in paragraph 13 of the counter affidavit, the relevant Tariff Order of the Commission provided for only fixed charges to be paid to the petitioner with no dispatch of electricity from the petitioner's plant. The 1st Respondent has on its own coined the word 'zero power generation' in its averment and the averment of the 1st Respondent is misleading. Further, the 1st Respondent recognizes that it was required to obtain prior approval. As is known from the various applications and orders passed, the 1st Respondent has consistently obtained only post facto approval and the same was granted from time to time by the Commission.

6.4. As regards the averments made in paragraph 14 of the counter, even though the Tariff Order of the TNERC stipulated no dispatch of the Petitioner's Plant for FY

2012-13, the SLDC had given dispatch instructions for operating the plant at various levels periodically due to which the Petitioner had generated, supplied and billed for substantial units. The 1st Respondent had initially paid for the units as billed without any deductions. This would clearly demonstrate that the claim of TANGEDCO' of allegedly allowing only fixed cost is demonstrably wrong. In fact the payment was made in terms of the PPA, recognising the peculiar nature of the petitioner's plant operations and the technical issues.

6.5. As regards the averments made in paragraph 15 of the counter, it would be pertinent to reiterate that this paragraph recognises that it was the TANGEDCO's responsibility to obtain approval as provided in the Tariff Order and the approvals were also being granted when sought for with appropriate reasons.

6.6. As regards the averments made in paragraph 16 of the counter, the 1st respondent's averment is too simplified without reference to the specific facts of the case or to the continuous efforts made by the Petitioner to discuss with the 1st Respondent to find a suitable solution to the issue related to continuous heating required for the fuel, viz. LSHS (in the fuel tanks and pipe lines) to keep the Petitioner's plant in readiness at all times (in spite of 'zero' dispatch as per the Tariff Order of the TNERC).

The 1st Respondent had not considered the technical constraints and subsequent alternative operation suggested by the Petitioner to meet out the zero dispatch instructions. The Petitioner submits that as per the original equipment manufacturer i.e. Wartsila, continuous requirement of steam for heating purposes is required and at all times at least one engine connected with the Exhaust Gas Boiler

(of steam generating capacity of 4.27 MT per hour) as to be operated at a minimum technical feasible load of 13 MW as mutually agreed by the Petitioner and the Respondents earlier or an appropriate package boiler is to be newly installed and operated to produce enough steam to keep the liquid fuel in warm condition to enable continuous longer periods of zero power operation. These details had all been brought out in the petition at paragraphs 11 and 12.

6.7. As regards the averments made in paragraph 17 of the counter, the data presented by the 1st respondent details the number of units disallowed on account of injection of electricity during 11-07-2012 to 11-06-2013. But in fact, the 1st Respondent had made payment against the Petitioner's invoices as claimed including variable charges without any deduction. It was only in September 2013, the 1st Respondent unilaterally deducted the variable cost for the number of units as detailed therein.

6.8. As regards the averments made in paragraph 18 to 21 of the counter, the 2nd respondent SLDC is only functioning as a part of TANTRANSCO. In the State of Tamil Nadu, it is the TANTRANSCO which is also operating as the SLDC. As per the provisions of the Electricity Act, 2003, it is important that the SLDC work independently in the discharge of its statutory functions and there is no conflict of interest between the generators and utilities. Further the provisions nowhere state that payment under PPAs would be regulated by the SLDC. The accounting to be done is only a record of the electricity that flows through the grid which is very different from the liability to pay. Such power of determining liability has not been conferred upon the SLDC as is sought to be suggested.

Though TANGEDCO has averred that SLDC issued dispatch instruction to the grid connected generators from time to time on real time operation to ensure grid security and economic operations, it has completely ignored the legislative mandate found in section 32 of the Electricity Act, 2003 to comply with the contracts entered into with the licensees or the Generating companies. Further such power generated was always done with appropriate intimation and was also accepted. This is evident from the fact that the petitioner's operations and generation for minimum technical requirements did not result in any grid issues. The Respondent's interpretation of the provisions is completely incorrect and contrary to the text of the statute.

6.9. As regards the averments made in paragraphs 22 to 24 of the counter, TANGEDCO has extracted the provisions of Section 32 & 33 of the Electricity Act and has completely ignored the legislative mandate in the same to refer any dispute which arises with reference to quality or safe, secured and integrated operation to the State commission for decision. The fact that such issue was never referred to during the entire time, shows that in fact there was no threat to safety of the grid. The present stand is therefore a clear afterthought. The petitioner states that TANGEDCO in order to justify its position which it seeks to project should have, in a time bound manner taken up the matter of unauthorized injection of power before the Commission within a stipulated time and violations, if any, should have been notified to the petitioner in a time bound manner.

The petitioner further sets forth below the contents of Para 6.3 (a) of the PPA:-

“Dispatch

(a) The Company shall follow Dispatch Instructions issued in accordance with this Agreement. TNEB shall only issue Dispatch instructions which are in the interest of an integrated grid operation consistent with the Technical Limits and the avoidance of a Project shutdown consistent with the provisions of this Agreement. TNEB shall not issue part-load Dispatch Instructions to the Company other than those expressly provided for in Article 6.3(b). Deemed generation attributable to compliance with Dispatch Instructions shall be calculated by the Company on the basis of the Dispatch Instructions”.

Thus, it is clear that TNEB shall only issue dispatch instructions which are in the interest of an integrated Grid operation consistent with the Technical Limits and the avoidance of Project Shut down consistent with the provisions of this Agreement.

As per PPA Clause 6.4(b), "in the event that after the date hereof TNEB develops a dispatch or Grid code for the Grid system, the parties shall negotiate in good faith to agree with a view to replacing Article 6.3(a) with the provisions in such code, on the basis that such replacement provisions shall apply to all Generating systems within the Grid systems and shall be no less favorable than the dispatch provisions of this Agreement"

The Operating Procedure of the plant jointly finalized by the Petitioner, the Respondent and representative of TANTRANSCO was not approved by the Respondent. This procedure does not envisage '0' power dispatch instructions from SLDC. However during periods of low grid demand, technical requirement of Single engine operation out of 7 units at 13MW as per OEM recommendation was also furnished and no consideration was made by SLDC.

The Respondent had not suffered in any manner on account of the generation and dispatch of electricity solely on account of the heating requirement of the fuel. The Respondent had in fact earned revenue from the electricity generated and supplied by the Petitioner during periods of zero dispatch instructions, by selling to the Respondent's consumers.

6.10. As regards the averments made in paragraph 25 of the counter, the petitioner stated that it is evident on a reading of the PPA that TANGEDCO is required to pay for the entire output of the project in accordance with Article 8. As already stated, power projects, unlike other business, are set up at huge cost and on the basis of assured periodic cash flows. It is precisely for this reason that Article 8.3 (d) specifies that, should TANGEDCO dispute an invoice it shall nevertheless pay first and thereafter raise a dispute. Given the size of power projects and the stakes involved, uncertainty is required to be removed within reasonable short time frames. It is for this reason that the Petitioner and TANGEDCO agreed in Article 8.3 (d) that no disputes could be raised beyond a period of 360 days from the Due Date for payment. The aforesaid mechanism had been agreed to between TANGEDCO and the Petitioner, primarily to ensure the objectives of assured timely cash flows and promptitude, as stated above. Adequate deterrents have also been stipulated for non-promptitude. It is therefore evident that timely cash flows and promptitude of action by the aggrieved party are the essence of the Power Purchase Agreement.

6.11. As regards the averments made in paragraphs 26 and 27 of the counter, Please refer to paras 22 to 24 above. In any event, it is not for the SLDC to

'disallow payment for energy'. The SLDC does only accounting of energy in the grid and is not concerned with contractual obligations between a generator and a licensee.

6.12. As regards to the averments contained in para 28 of TANGEDCO's counter citing the Appeal No. 127 of 2012 filed by M/s. GMR Power Corporation Private Limited, the reliance upon the same is wholly misplaced. The Petitioner stated that they have not challenged the tariff order and the subject matter of appeal filed by GMR is different to the prayers sought by the Petitioner. The Petitioner also states that none of the grounds raised in the counter have any merits in as much as the petition neither challenges the Commission's Tariff Order nor is it in any manner similar to the Appeal No. 127 of 2012 but is wholly concerning with issues arising under the Power Purchase Agreement between parties and the mutual rights and obligations of parties arising therefrom. In this regard it is only the Commission which is the sole adjudicatory authority for determining the disputes and issues which have arisen therefrom. The reliance upon wholly unconnected and inapplicable proceedings is clearly a dilatory and diversionary tactic that is sought to be adopted.

6.13. As regards to the averments contained in paragraphs 29 and 30 of counter, reference by the 1st Respondent to the DRP 27 of 2012 filed by the Petitioner on 6th December 2012 and withdrawal of the same on 14-12-2018 does not have relevance to the current petition as per the detailed reasoning given below:

- (a) DRP 27 of 2012 included multiple issues which were in principle connected to the directions for maintenance of generation under certain

circumstances. Since the PPA period itself stood expired without an adjudication, the petition became infructuous. Therefore, it is incorrect to claim that the said proceedings are substantive proceedings for the purposes of this claim;

(b) When the DRP No. 27 of 2012 petition was filed, there was no actual deduction and the energy injected into the Grid was fully paid. Subsequently in September 2013, the actual deduction towards energy injected into the Grid was made. Since no fruitful decision could be arrived at even after correspondence and discussion with TANGEDCO, DRP No. 66 of 2014 was filed in July 2014 which is the subject matter now.

(c) Since (i) DRP No.27 of 2012 were no longer valid with expiry of the PPA on 28thFebruary 2016 (ii) the specific issue of payment of start-up fuel cost was included in DRP No.16 of 2012 (which was still to be adjudicated) and (iii) the other specific issue of deduction towards energy injected into the Grid was filed through this petition No DRP 66 of 2014, the DRP No. 27 of 2012 was redundant and hence withdrawn.

(d) Complete breach and violation of the terms of the PPA by the 1st Respondent in making unilateral deductions from the Tariff Invoices of the Petitioner (from payments already made) has given rise to the present petition.

6.14. As regards to the averments contained in paragraph 31 of counter, reference to Force Majeure Clause by the 1st Respondent does not still relieve of the liability of the 1st Respondent to pay Total Fuel Cost as per Article No 4 (c) under Variable

Charge Payments of Appendix D, in addition to Fixed Charges and payment in full against invoices as per Article 8.3 (d) and raise disputes.

6.15. As regards to the averments contained in paragraph 31 of counter, it was the responsibility of the 1st Respondent and SLDC to optimise scheduling and dispatch in accordance with the contracts entered into with the Licensees as stipulated by the TNERC in their Tariff Order dated 20.06.2013.

In the absence of the Petitioner's proposal of finding alternative for meeting the heating requirement of LSHS (in fuel pipes and tanks) etc., in the event of NIL generation not having been examined by the 1st Respondent, the Petitioner had to continue to operate the plant at technical minimum load of 13 MW.

The contents of this para are denied and it is submitted that the 2nd respondent SLDC is only functioning as a part of TANTRANSCO. In the State of Tamil Nadu, it is the TANTRANSCO which is also operating as the SLDC. As per the provisions of the Electricity Act 2003, it is important that the SLDC works independently in the discharge of its statutory functions and there is no conflict of interest between the generators and utilities.

SLDC continued to function as part of TANTRANSCO and not as an individual entity as required under the Electricity Act, 2003..

6.16. As regards to the averments contained in paragraph 35 of counter, the TNERC in its Tariff Order dated 20-06-2013 has ordered in Para 2.217 that the matter concerned to payment obligations or applicability of Articles of a bilateral PPA are outside the purview of the Tariff Petition (which is generic in nature) and

hence the reliance of petitioner on the above Tariff Order is just and valid irrespective of the dispute period.

6.17. As regards to the averments contained in paragraphs 36 to 38 of counter, the petitioner submits that the reference to the orders of the Commission in PPA No.9 of 2013, the Hon'ble APTEL in Appeal No. 120 of 2016 and Supreme Court order dated 15.01.2018 are misplaced here as in those matters the plants were merchant power plants and hence, the decision in those matters would be inapplicable to the present dispute. The present dispute relates to the deduction made by the 1st Respondent from the Tariff Invoices of the Petitioner for electricity generated and supplied to the 1st Respondent, under an exclusive PPA signed with the 1st Respondent.

7. Rejoinder to the Counter Affidavit of the 2nd Respondent:-

7.1. The present DRP has been filed by the petitioner challenging the arbitrary and illegal action of the respondents in making an illegal recovery of the sums paid to the petitioner for supply of power on the ground that the said power was supplied when the 2nd respondent had instructed the petitioner not to dispatch power. The recovery made by the 1st respondent is clearly contrary to the terms of the Power Purchase Agreement entered into.

7.2. As regards the averments made in para 2 of the counter, the petitioner is denying the statements made in the counter affidavit of the 2nd respondent, State Load Despatch Centre, herein after referred to as "SLDC".

7.3. As regards the averments made in para 3 of the counter, the 2nd respondent SLDC is only functioning as part of TANTRANSCO. In the State of Tamil Nadu, it is the TANTRANSCO which is also operating as the SLDC. As per the provisions of the Electricity Act, 2003, it is important that the SLDC works independently in the discharge of its statutory functions and there is no conflict of interest between the generators and utilities.

7.4. As regards the averments made in para 4 of the counter, the 2nd respondent has averred that it issues dispatch instruction to the grid connected generators from time to time on real time operation to ensure grid security and economic operations, it has completely ignored the legislative mandate found in section 32 of the Electricity Act, 2003 to comply with the contracts entered into with the licensees or the generating companies.

7.5. As regards the averments made in para 5 of the counter, the 2nd respondent has extracted the provisions of section 32 of the Electricity Act and has completely ignored the legislative mandate in the same to refer any dispute which arises with reference to quality or safe, secured and integrated operation to the State Commission for decision. The petitioner states that the 2nd respondent in order to justify its position which it seeks to project should have, in a time bound manner taken up the matter of unauthorized injection of power before this Commission within a stipulated time and violations, if any, should have been notified to the petitioner in a time bound manner.

7.6. As regards the averments made in para6 of the counter, the contents of this para are incorrect since zero dispatch instruction is claimed to be on grounds of frequency, while most of the alleged violations referred to by the 2nd respondent were during the period when the grid was within the normal operating frequency band width. Hence, it is evident that dispatch instructions for zero power generation have not arisen out of grid safety measure as alleged by the 2nd respondent.

7.7. As regards the averments made in para7 of the counter are denied and the SLDC is required to establish the need for zero power dispatch instructions given by them. The grid frequency was within the operating band during almost all the instances of zero power dispatch instructions from SLDC and hence there was no need for total shut down of the petitioner's plant. The petitioner had also brought to the attention of the respondent the provisions of the PPA wherein 6.3 (b) (i) provides that no dispatch instruction shall require the company to operate the project at a load below eight five percent of rated capacity.

7.8. As regards the averments made in para8 of the counter, the petitioner states that since Grid frequency was well within the Operating Band i.e. 49.70 to 50.20 Hz and in fact, there was a deficit in energy requirement, there were no grid conditions necessitating the issue off zero dispatch instructions.

7.9. As regards the averments in para9 of the counter, there has been no under drawal as alleged by SLDC during the periods of zero power instructions given by

them. During these periods the grid was within normal operating frequency range of 49.70-50.20 Hz.

7.10. As regards the averments made in para10 (a) of the counter, the petitioner sets forth below the contents of Para 6.3 (a) of the PPA:-

“Dispatch

(a) The company shall follow Dispatch Instructions issued in accordance with this Agreement. TNEB shall only issue Dispatch Instructions which are in the interest of an integrated grid operation consistent with the Technical Limits and the avoidance of a Project shutdown consistent with the provisions of this Agreement. TNEB shall not issue part-load Dispatch Instructions to the Company other than those expressly provided for in Article 6.3(b). Deemed generation attributable to compliance with Dispatch Instructions shall be calculated by the Company on the basis of the Dispatch Instructions”.

Thus, it is clear that TNEB shall only issue dispatch instructions which are in the interest of an integrated Grid Operation consistent with the Technical limits and the avoidance of project shut down consistent with the provisions of this agreement

As per PPA Clause 6.4 (b), “in the event that after the date hereof TNEB develops a dispatch or Grid code for the Grid system, the parties shall negotiate in good faith to agree with a view to replacing Article 6.3 (a) with the provisions in such code, on the basis that such replacement provisions shall apply to all generating systems within the Grid systems and shall be no less favourable than the dispatch provisions of this Agreement.”

The operating procedure of the plant jointly finalized by the petitioner, the respondent and representative of TANTRANSCO was not approved by the respondent. This procedure does not envisage zero power dispatch instructions from SLDC. However, during periods of low grid demand, technical requirement of

single engine operation out of 7 units at 13 MW as per OEM recommendation was also furnished and no consideration was made by SLDC.

7.11. As regards the averments made in para10 (b) of the counter, the dispatch instructions for bringing down to zero MW from full load operation is maintained without any delay, but bringing the plant back to full load operation from zero MW whenever grid warrants, as per the dispatch instruction of SLDC to meet the emergency requirement of grid stability is not possible due to technical problems.

Plant full load is to be attained as per dispatch instruction provided in PPA within 40 minutes time, but full load is generally reached only after 1 to 1.5 hours after zero dispatch due to the time required for heating up of the fuel system and engine cooling water system and the same sometimes even takes up to 2 to 2.5 hours. However, during such instances, the 2nd respondent has not raised any issues of grid stability.

7.12. As regards the averments made in para10 (c) of the counter, the comparison made by the 2nd respondent with GMR is incorrect in their unit, fuel storage facility is not being handled by GMR as per their contractual agreement and it is the scope of their fuel supplier, HPCL. Hence, GMR plant does not have to bother about fuel handling system heating requirement. In the case of the petitioner, fuel storage is the responsibility of the petitioner.

7.13. As regards the averments made in para13 of the counter, the petitioner submits that the reference to the orders of the Commission in D.R.P. No.12 of 2011 and the Hon'ble APTEL in Appeal No. 123 of 2010 are misplaced here as in those

matters the plant was a merchant power plant and hence, the decision in those matters would be inapplicable to the present dispute.

7.14. As regards the averments made in para17 of the counter, the petitioner denies the contention of the SLDC that injection of power during periods of zero power dispatch instructions was in isolation of Grid Code. In fact, the instructions of the SLDC for zero power dispatch instructions were arbitrary and did not consider the requirements of the Grid as detailed below:-

(a) As per CERC notification, Unscheduled Interchange has to be within the limits of 250 MW and violation is considered if it exceeded 2 consecutive time block and taken place during entire 84 violations period which constitutes 17.86% of violations. During the violation periods, grid under drawl was more than petitioner's injection of power about 12 MW. It shows that power injection by other generating companies was much higher and it is not reasonable to pinpoint only to the petitioner.

(b) There were only 173 time blocks under drawl above 250 MW out of total 2551 disputed blocks of violation periods which constituting 6.78% and breaching of the limit had taken place when the frequency was in the rage of 49.70-49.90 Hz. and it constitutes about 90% of period. This indicates grid was striving for injection and Unscheduled Interchange of above 250 MW was momentary and might be a result of other reasons like tripping / load shedding etc. Remaining 93.22% of disputed blocks were in demand of power injection into grid and marginal power injection of about 12 MW by petitioner's plant could in fact helped in stabilizing grid operation.

(c) Operating recommended band of frequency by the Electricity Act, 2003 is 49.70 – 50.20 Hz. No of time blocks accounted during violation periods are 2551 and out of which there are only 57 time blocks falling in frequency range of more than 50.20 Hz constituting 2.23% only. This percentage is very negligible because of dynamic state of grid and had come back into normal operating band in the immediate next block. This clearly indicates that the said unauthorized power injection periods were not under security threat of grid and grid was in need of power injection for smooth operation.

(d) Various provisions of the Electricity Act, 2003 and CERC regulations notified on 6th January 2014 have not yet been fully implemented in the State of Tamil Nadu – such as,

- Availability Based Tariff (ABT)
- Free Governor Mode Operation (FGMO)
- Automatic Demand Management Scheme (ADMS)

The ground reality of Indian Power System scenario is,

- No spinning reserve / surplus power as envisaged by National Electricity Policy.
- FGMO / RGMO performance is insignificant.
- Consistent deviation of drawl by regional entities beyond prescribed limit.
- Absence of automatic generation control (AGC)
- Sharp changeover of big quantum of loads

In the light of the above, invoking penalty clause for violation of Grid Code as alleged by SLDC is totally unreasonable and unwarranted. The plea of SLDC for imposition of penalty shall have to be rejected.

8. Written Submission on behalf of the Petitioner:-

8.1. The unilateral recovery made by the 1st respondent is contrary to the express provisions of the Electricity Act, 2003, more specifically section 32, the Power Purchase Agreement entered into between the parties as also the principles laid down by the Commission and APTEL. Since August 2012, the 2nd respondent had been issuing zero power dispatch instructions regularly for adherence by the petitioner purportedly pursuant to the Merit Order Dispatch regime that is notified by the Commission. It is significant to state in this regard that the Electricity Act, 2003 occupies the highest position in terms of precedence while determining rights of parties and the specific provision in that regard relating to functions of State Load Despatch Centres provides as follows:-

Section 32. (Functions of State Load Despatch Centres):--- (1) The State Load Despatch Centre shall be the apex body to ensure integrated operation of the power system in a State.

(2) The State Load Despatch Centre shall -

(a) be responsible for optimum scheduling and despatch of electricity within a State, in accordance with the contracts entered into with the licensees or the generating companies operating in that State;

Even where Regulations are in place and require compliance, the implementation should nevertheless be in consonance with the terms of the contract between

parties, which in this case is the PPA. Significantly the Respondents have not addressed any basis for non-adherence to this statutory mandate in their pleadings or arguments.

8.2. The plant being established for a particular manner of operation and the PPA being structured for the same, the technical parameters are relevant considerations and the same are in fact embodied in the PPA. The instructions issued are in contrast with clause 6.3 of the PPA and OEM's recommendation vide its letter dated 07.08.2012 stating that the plant has to be operated intermittently for 16 hours a day with a maximum continuous shutdown period of 4 hours at a time and also suggested installing a package Boiler of 4270 kg/hr to avoid solidification of Fuel Oil, if the plant has to be shutdown for a continuous period beyond 4 hours. However, even when this was communicated to the 1st Respondent, the 2nd Respondent continued to issue zero dispatch instructions. There is no technical justification that has been provided with supporting documents to show that the OEM recommendations are not correct. Such being the case, there arises no basis for taking a different view by the Respondents. Mere reliance upon compliance with Merit Order Dispatch without reference to the statutory mandate to respect contracts is therefore wholly untenable. The Petitioner through numerous letters informed the 1st Respondent that the plant is not designed to handle unplanned stoppages for considerable period in a day and the 1st Respondent was made aware of the difficulties faced by the petitioner due to the zero power generation instructions issued by the 2nd respondent. It was further highlighted to the respondents that under clause 6.3 of the PPA, the respondent need to issue

dispatch instructions at all times to ensure the plant is running at 85% PLF and dispatch instructions are to be issued to avoid plant shut down.

8.3. While so, the 1st respondent started communicating higher non-admission with respect to variable cost claim, without explaining the basis for the same. It was further informed that from the billing period from 11.07.2013 to 11.08.2013, certain units were disallowed when power was injected into 2nd Respondent's grid during zero dispatch instructions without any details of the disallowed units. The 1st Respondent vide its letter dated 06.09.2013 communicated to the Petitioner that an amount of Rs.5,42,57,499/- is deducted from the Tariff Invoice for the billing period 11.07.2013 to 11.08.2013 towards disallowed units by the 1st Respondent, as the same was paid along with the concerned tariff invoices and also stating that interest relating to the abovementioned amount will be deducted from the subsequent tariff invoice. The Petitioner protested this deduction in its letter dated 17.09.2013. The petitioner in its letter dated 01-10-2013 referred to relevant provisions of the PPA, pointing out that such adjustment was impermissible. Nevertheless, the 1st Respondent while paying the next Tariff Invoice illegally deducted amount.

8.4. The key dates and events & provisions of the PPA in respect of the present dispute are stated herein below:

Key Dates & Events

S. No.	Date	Particulars of Event
1	22-05-1998	Power Purchase Agreement entered into between the Petitioner and the Respondent
2	19-01-1999	Amended Power Purchase Agreement entered into between the Petitioner and the Respondent

3	16-12-1999	Amended Power Purchase Agreement entered into between the Petitioner and the Respondent
4	01-03-2021	Commercial Operation (COD) was achieved by the petitioner.
5	22-11-2011	Meeting conducted by the 1 st respondent with the petitioner for working out the technical and commercial impact for operating plant at Nil generation.
6	26-11-2011	1 st respondent's letter to the petitioner regarding backing down of the plant by maintaining Nil generation.
7	01-08-2012	OEM, Wartsila's letter to the petitioner informing the installation of package boiler if at all the plant is to be maintained at Nil generation for continuous period.
8	07-08-2012	OEM, Wartsila's letter to the petitioner informing the installation of package boiler if at all the plant is to be maintained at Nil generation for continuous period.
9	08-08-2012	Petitioner's letter intimating the Respondent regarding the OEM's recommendation
10	22-06-2012	Petitioner's letter to the Respondent requesting to maintain 13 MW single engine operation till firm arrangement for nil generation.
11	28-06-2012	Petitioner's letter to the Respondent requesting to maintain 13 MW single engine operation till firm arrangement for nil generation
12	06-07-2012	Petitioner's letter to the respondent requesting to maintain 13 MW single engine operation till firm arrangement for nil generation.
13	03-08-2012	Petitioner's letter to the Respondent requesting to maintain 13 MW single engine operation till firm arrangement for nil generation
14	21-02-2013	1 st Respondent's letter to the petitioner communicating higher non-admission with respect to variable cost claim, without explaining the basis for the same. It was further informed that from the billing period 01-04-2012 to 11-11-2012, certain units were disallowed when power was injected into the 2 nd Respondent's grid.
15	07-06-2013	1 st Respondent's letter communicating payment details with respect to invoices for the period 11-07-2013 to 11-08-2013
16	28-06-2013	Letter of the 1 st respondent setting out payment details made to the petitioner
17	20-06-2013	Tariff Order of the Commission
18	03-08-2013	1 st Respondent's letter to the petitioner stating that TNERC has pronounced order stating zero power are within provisions of PPA and 1 st respondent has rights to issue zero power dispatched and issue credit notes for the disallowed units.
19	12-08-2013	Petitioner's letter to the 1 st respondent citing the clauses of TNERC order informing that SLDC is responsible for optimum scheduling in accordance with the contracts

		entered into with the licensees or the generating companies operating in that State
20	06-09-2013	1 st respondent's letter to the petitioner informing the deduction of Rs.5,42,57,499/- from the tariff invoice payment towards disallowed units for non-compliance of zero power dispatch instructions
21	17-09-2013	Petitioner's letter to the 1 st respondent informing the unilateral deduction is not as per the provisions of the PPA
22	30-09-2013	1 st respondents letter to the petitioner providing the details of the deduction of Rs.5,42,57,499/- from the regular tariff invoice from 11-07-2013 to 11-08-2013
23	01-10-2013	Petitioner's letter to the 1 st respondent citing the provisions of PPA and that the deduction is not in order with the provisions of the PPA.
24	11-11-2013	1 st respondent's letter to the petitioner informing the deduction of interest of Rs.40,14,245/- for the amount paid for the disallowed units towards zero dispatch instructions
25	01-11-2013	1 st respondent's letter to the petitioner informing that they have deducted the amount and interest based on the instructions of SLDC

8.5. Key Provisions of PPA

"Article 6.3

Dispatch

(a) The company shall follow Dispatch Instructions issued in accordance with this Agreement. TNEB shall only issue Dispatch Instructions which are in the interest of an integrated grid operation consistent with the Technical Limits and the avoidance of a Project shutdown consistent with the provisions of this Agreement. TNEB shall not issue part-load Dispatch Instructions to the Company other than those expressly provided for in Article 6.3(b). Deemed generation attributable to compliance with Dispatch Instructions shall be calculated by the Company on the basis of the Dispatch Instructions.

(b) Except in the event of an Emergency affecting the Grid System:

(i) no Dispatch Instructions shall require the Company to operate the Project:

(1) during the Initial Tariff Year, Stub year and during the first five (5) Tariff Years, at a load below ninety percent (90%) of the Rated Capacity;

(2) during the next succeeding five (5) Tariff Years, at a load below eighty seven point five per cent (87.5%) of Rated Capacity; and

(3) during the next succeeding five (5) Tariff Years, at a load below eighty five per cent (85%) of Rated Capacity.

(ii) There shall be no more than 50 off line dispatch instruction per Unit per Tariff Year which require the company to re-start a Unit after it has been backed down. TNEB shall also pay the Company under a Supplementary Invoice, the Company's reasonable start-up costs for each start-up in excess of ten (10) start-ups per Unit at a start-up charge calculated in accordance with Appendix L; this clause will have an overriding effect over the dispatch instructions specified in 6.3 (b) (i) subject however to TNEB allowing the Project to achieve PLF of 85%.

Clause 8.3 (d)

Disputes of PPA - In the event of any dispute as to all or any portion of an invoice, TNEB shall nevertheless pay the full amount of the invoice when due and may serve a notice on the company that the amount of invoice is in dispute, in which event the provisions of Article 15 shall be applicable. If the resolution of any invoice dispute requires the company to reimburse TNEB, the company will pay TNEB interest on the amount to be reimbursed at the rate of interest specified in Article 8.6 to apply to overdue amounts owed by the TNEB”.

8.6. The entire plant has been designed and built by Wartsila, an EPC contractor particularly with regard to the following terms as mentioned in the contract between the Petitioner and Wartsilla:

- a. Heat Rate to be maintained at 1980 Kcal / kwhr;
- b. Auxiliary Consumption limiting to 4.1 % of generation;
- c. Guaranteed plant load between 85% to 100% of plant capacity at all times in efficient conditions;
- d. Emission levels to be maintained as per the license issued by the Pollution Control Board;
- e. Operation and maintenance cost;
- f. NO_x and SO_x levels as per TNPCB which is mentioned in Appendix A of the PPA.

8.7. The following can be deduced based on above contractual terms:

- a. The engines are designed for operation at 85% and above the rated capacity.
- b. The performance guarantee factors are already defined in Schedule D of the EPC contract which is based on 85% and above PLF levels.
- c. The guaranteed exhaust gas emissions as per TNPCB norms can be achieved at an engine load of 85% to 100% load only.

8.8. The mandate of section 32 of "optimum scheduling and despatch of electricity within a State, in accordance with the contracts entered into with the licensees or the generating companies operating in that State" is incapable of being interpreted in any manner other than to respect the mandate of the terms of the PPA.

8.9. Despite the above-mentioned terms being communicated to the Respondent, the Respondents continued to issue instructions of zero dispatch or to bring down load. The instruction letters from TNEB show that TNEB had acted differently during various periods of time throughout the term of the PPA. A sample of the instructions letters is listed herein below:-

- (a) TNEB letter dated 10-01-2002 – Totally shut down the plant due to ensuring Pongal holidays.
- (b) TNEB letter dated 11-01-2002 – Bring the plant load to technical limit of one unit @ 15 MW only.
- (c) TNEB instructions dated 11.09.2007 -To pick up the generation from 13 MW (which was reduced to 85% of the capacity of each unit) to

106 MW. This clearly shows that TNEB only gave instructions per Unit and not as contended by them that they have not given instruction to start - stop a unit (s) but only to reduce the load.

- (d) TNEB instructions dated 13.06.2004 and petitioner's letters dated 13.06.2004,04.03.2006 - Giving instructions to bring down the plant to zero load and to shut down the plant. The Petitioner vide its letters requested TNEB to permit generation of electricity with a load of at least 15 MW.
- (e) TNEB instructions dated 14.06.2006 and 11.06.2011 - To Increase or decrease the load from or to a particular MW to number of units to operate - Like Zero MW to five machines full load and Five machines full load to zero MW.
- (f) Petitioner's confirmation dated 11.06.2011 - Once the LD instruction is complied, the Petitioner would send a confirmation of synchronization / desynchronization of units with their serial number and main meter reading of that particular Unit at the particular time, which can be seen from the confirmation messages sent to the LD centre.

Therefore, TNEB is well aware of which Unit have been stopped or started based on their instruction.

8.10. During the year 2006, TNEB started discussions with the Petitioner and again requested for the technical feasible load of the diesel engines. The Petitioner as time and again informed TNEB that the optimum level of running these types of

Wartsila engines is between 85% and 95%, per Wartsila, who is the Original Equipment Manufacturer. Accordingly, TNEB, based on OEM specification arrived at the technical minimum load a 13 MW per unit and started to issue the load dispatch instructions accordingly and any decrease or increase will start from / to 13 MW from / to various level of loads. This itself shows that the respondents also recognised the pre-eminent importance of the technical mandates under the PPA.

8.11. The PPA being a binding contract, governs the relationship between the two parties and as such, must be interpreted to be practical and give it efficacy. The Hon'ble Supreme Court in Nabha Power Limited vs. Punjab State Power Corporation Limited and anr. (2018) 11 SCC 508 at paras 34-35:

"34. To begin with we refer to the judgement of the Court of Appeal in The Moorcock, Bowen, L.J., dealt with the implied warranty on the part of the owners of the jetty, in respect of a contract made for the use of the jetty to a ship, for discharge of its cargo. The name of the ship was The Moorcock. It was observed as under: (PD p. 68)

"Bowen, L.J., - ... Now, an implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or an express warranty, really is in all cases founded on the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe [that] if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all the events it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those parents are chances."

8.12. Therefore, despite understanding the requirements of the power plant, recommendations of the OEM and communications from the petitioner regarding the unviability of keeping the plant at zero power dispatch, the Respondents cannot claim that their actions contrary thereto are still valid. In fact, apart from the reliance on the requirement to comply with the Merit Order Despatch, none of the other grounds have been answered.

8.13 The power projects like that of the Petitioner are set up with huge cost and on the basis of assured periodic cash flows. This is precisely the reason clause 8.3(d) specifies that the 1st Respondent should pay the invoice first and thereafter raise a dispute. Given the size of power projects and the stakes involved, uncertainty is required to be removed within reasonable short time frames. Therefore, such mechanism had been agreed to between the first respondent and the petitioner, primarily to ensure the objectives of assure the timely cash flows and promptitude. This also goes on to show that timely cash flows and promptitude of action by the aggrieved party or the essence of the PPA.

8.14. While so, the 1st Respondent, vide its letter dated 06.09.2013 communicated to the Petitioner that an amount of Rs.5,42,57,499/- is deducted from the Tariff Invoice for the billing period 11.07.2013 to 11.08.2013 towards disallowed units by the 1st Respondent as the same was paid along with the concerned tariff invoices. The letter further informed that interest relating to the abovementioned amount will be deducted from the subsequent tariff invoice. The petitioner vide its letter dated 17.09.2013 vehemently protested the deduction of the abovementioned amount. The petitioner communicated vide its letter dated 01.10.2013 to the first

respondent referring to Clause 8.3 (d) of the PPA and clause 15 of the PPA and pointed out that such adjustment was impermissible. However, the 1st respondent paid no heed to the same.

8.15. The action of the 1st respondent in unilaterally deducting the disputed amounts is in complete contrast to the provisions in the PPA.

8.16. The 1st respondent has enriched itself by selling the power fed into the grid by the petitioner and also deducted the amount from the petitioner's invoices. The reliance upon unauthorised injection in contravention of the PPA terms have no relevance to the present claim. In Indo Rama Synthetics (I) Ltd., Nagpur Vs. Maharashtra Electricity Regulatory Commission, the entire basis of the conclusion was due to injection, without valid contract and or complying with scheduling requirements as per prevalent procedures for scheduling and dispatch. The Petitioner's plant was designed as a base load station with valid Power Purchase Agreement, which clearly stipulated the PLF to be maintained during the PPA period. Therefore, the said judgment would have no applicability and the conclusion will support the petitioner's stand. Similarly in the case of OPG Power Generation Pvt Ltd Vs. TNERC the basis of the conclusion was that no compensation is payable for the energy injected to the grid in the absence of approval for open access and that further no compensation is payable to the petitioner therein for the energy injected into the grid in the absence of any agreement for sale of power and scheduling of energy for injection into the grid based on such agreement. However, the present petitioner's case is completely different and these judgments have no applicability. The 1st Respondent is in complete breach of the PPA conditions in the

guise of Merit Order Dispatch (MOD) ordered by the Commission without complying with the order which specifically stated that the SLDC, the 2nd respondent here in, shall be responsible for optimum scheduling and dispatch of electricity within the State "in accordance with the contracts entered into with the licensees or the generating companies operating in that State".

8.17. The details of alleged violations made by the Petitioner's Plant and penalty allegedly in terms of section 33 (5) of the Electricity Act, 2003 is claimed. This is not applicable to the petitioner's plant as the 1st Respondent has completely breached the PPA conditions and the 2nd Respondent has not complied with the TNERC MOD order.

8.18. More importantly, in the event of a claim in terms of money, even if the same is made in a counter, it has to be only as a counter-claim and for which the Respondent has to pay court-fee and get it adjudicated. In law any penalty has to be strictly proved and recovered after adducing evidence. In the absence of the above mandatory compliance, the claim is entirely without merit in that regard.

8.19. The Respondents relies on and incorrect interpretation of the tariff order passed by the Commission, the Tamil Nadu Grid Code and the provisions of the Electricity Act, 2003. A perusal of the tariff order, more specifically para 2.219 wherein the Commission has clearly stated that the SLDC, the 2nd respondent here in, shall be responsible for optimum scheduling and dispatch of electricity within the State in accordance with the contracts entered into with the licensees or the generating companies operating in that State.

8.20. As a matter of fact, the Commission has specifically noted the pendency of the DRP relating to zero dispatch instructions and as ordered in para 2.217 therein, with regard to payment obligations or applicability of articles of a bilateral PPA the same are outside the purview of the tariff petition. The Commission has also recognised that approval for dispatch outside merit order is to be obtained by the 1st Respondent. It is thus evident that the first respondent is resorting to such self-serving interpretations. The stand of the respondent is in fact contrary to what the Commission has stated.

8.21. The D.R.P. No.27 of 2012 included multiple issues which were in principle connected to the directions for maintenance of generation under certain circumstances. However, since the PPA period itself stood expired without an adjudication, the petition become infructuous. Therefore, it is incorrect to claim that since the said proceedings were withdrawn, the present petition is also not maintainable. The rendering of a petition for directions with regard to operations which were rendered infructuous by expiry of the PPA have no bearing on a monetary dispute that continue to remain pending adjudication.

8.22. When D.R.P. No. 27 of 2012 was filed, there was no actual deduction and the energy injected into the Grid was fully paid. It was only in September 2013, the actual deduction towards energy injected into the Grid was made by the 1st Respondent. Since no fruitful decision could be arrived at even after multiple discussions with TANGEDCO, the instant petition was filed.

9. Written Submissions filed by the 1st Respondent –TANGEDCO:-

9.1. Having unauthorizedly injected power into the grid by violating the SLDC's zero dispatch instructions, which were given based on the Commission's Tariff Order T.O. No.1 of 2012 and claimed payment for the unauthorisedly injected power, the petitioner has no locus standi in filing this petition before the Commission.

9.2. It is entitled for payment of the power which is unauthorisedly injected by them into the grid by violating the grid code and zero dispatch instructions of SLDC and citing as per the provisions of PPA. There is no provision for claiming payment for unauthorised injection of power by the generator in the PPA.

9.3. The Petitioner has filed DRP 27 of 2012 and its collateral proceedings DRP 66 of 2014 before TNERC against issuance of zero dispatch instructions by SLDC, which were given based on Commission's Tariff Order T.O.No.1 of 2012. The Petitioner's act of challenging the issuance of zero dispatch instructions by SLDC without challenging the Tariff order is not maintainable.

9.4. Having withdrawn the substantive D.R.P. No.27 of 2012 which challenged the zero despatch instructions and seeking payment for all energy fed into the grid without seeking any liberty, it is not open to the petitioner to seek the same relief in a collateral proceeding through D.R.P No. 66 of 2014 and it is hit under the principles of resjudicata and is not maintainable.

9.5. As per the Power Purchase Agreement the Petitioner ought to have follow the dispatch instructions from State Load Despatch Center (SLDC), without obeying dispatch instructions of SLDC, this Petitioner has approached this

Commission seeking refund, on the preliminary issue without getting into the merits of the case, is liable to be dismissed.

9.6. This DRP itself is a Petition in disguise instead of challenging Commission's Tariff Order No. 1 of 2012, this Petitioner is challenging the payments deducted towards the unauthorised injection of Power, which is the cause of action of scrupulously implementing the Commission's Tariff order and is liable to be dismissed.

9.7. As per Regulation 75(1) of the Commission's (Terms and Conditions for Determination of Tariff) Regulation, 2005 the *"Distribution Licensee shall procure power on least cost basis and strictly on Merit Order Despatch and shall have flexibility to procure power from any source in the country"*.

9.8. The Commission in accordance with above Regulations, 2005 has determined the power purchase cost and gave the Merit Order Ranking for all available sources from which energy is available in FY 2012-13 under Table 192 of Tariff order dated 30.03.2012.

9.9. The Commission in the Tariff Order No. 1 of 2012 dated 30.03.2012, vide clause 7.1. prescribed the Merit Order Ranking for dispatch of power by TANGEDCO on least cost basis.

9.10. It is stated that the variable cost of the power generated from the Petitioner's power project was Rs.2.15/Kwhr during FY 2001-02 and gradually increased to Rs.11.15/Kwhr during the FY 2012-13.

9.11. As a Regulator, as per clause 7.1.2.f of Tariff order No 1 of 2012, TNERC listed the Petitioner's plant under the list of plants which are not scheduled as per Merit Order Despatch.

9.12. It is stated that due to purchase of power from liquid fuel based power plants (M/s Samalpatti Power Corporation, M/s GMR Power Corporation & M/s PPN Power Generating Company) this Respondent had to incur huge expenditure towards power purchase cost.

9.13. The Commission in the Tariff Order No 1 of 2012 dated 30.03.2012 vide clause 4.1.91 has ordered as follows:

*“For FY 2012-13, the Commission observed that TANGEDCO has projected less energy availability from GMR PCL as compared to Samalpatti PPCL and Madurai PPCL. The Commission has considered the power purchase quantum as submitted by TANGEDCO in the Petition. However the Commission notes that the energy available from all the three stations is much higher if PLF corresponding to full cost recovery is considered. During advanced operation, interse Merit Order Despatch shall be followed for despatching the stations. **The Commission has allowed the power to be purchased from IPPs on the basis of Merit Order Despatch for FY 2012-13**”.*

9.14. The Commission in the Tariff Order No 1 of 2012 dated 30.03.2012 vide clause 7.1.20 has ordered as follows:

“ In view of the above, the Commission feels that the fixed and variable cost claimed by TANGEDCO in respect of various IPPs is considered for FY 2011-12 and FY 2012-13. Further the Commission has allowed only fixed cost for those IPPs which do not get scheduled as per Merit Order Despatch discussed in earlier section. Wherever the Power Stations are to despatched outside Merit Order, TANGEDCO shall obtain approval of the Commission in advance by furnishing reasons for such action. In case of emergencies TANGEDCO is permitted to resort to such a practice but will approach the Commission within a week of such action along with the reasons for such action.”

9.15. The Respondent had perforce to despatch power only from the generators under Merit Order List. As per clause 7.1.20 of the Tariff Order No. 1 of 2012, Commission allowed only fixed cost for the Petitioner's plant which does not get scheduled as per Merit Order Despatch.

9.16. Complying with the orders of the Commission, the Petitioner's plant is being dispatched judiciously. This Respondent has filed various Miscellaneous Petitions based on the Tariff order for dispatching the Petitioner's power plant outside the merit order from April 2012. The Commission has also approved the despatches made by this Respondent judiciously from the Petitioner's Power plant, depending on the grid conditions.

9.17. Whenever the grid condition does not require dispatch of IPPs outside merit order, the Petitioner's plant was maintained at Zero generation as directed by the Commission. The Petitioner's plant was given zero dispatch instruction from 01.04.2012 onwards, based on the merit order dispatch by SLDC and during this zero dispatch period, as directed by the Commission, the Petitioner's plant was allowed fixed charges.

9.18. The letter from TANGEDCO to the Petitioner dated 20.06.2012 with regard to implementation of Tariff order 2012 is extracted as follows:-

The Hon'ble Tamil Nadu Electricity Regulatory Commission in the order No.1 of 2012 for Determination of Tariff for Generation and Distribution, dated 30.03.2012 for the year 2012-13 approved only fixed charges payable to M/s GMR, M/s Samalpatti, M/s Madurai power and M/s PPN. The Commission further ordered that wherever the above Power Stations are to be dispatched outside merit order, TANGEDCO shall obtain approval of the Commission in advance by furnishing the reasons for such action, vide clause 7.1.20 of the Order.

Present operation of M/s GMR, M/s SPC and M/s MPC Power plants at the minimum level of generation of 48 MW, 13MW and 13 MW respectively to avoid solidification of LSHS are not in consonance of the above order of Hon'ble TNERC.

Since, the clause 7.1.20 of the Tariff Order of TNERC dated 30.03.2012 shall have to be implemented by TANGEDCO, it is proposed to conduct a meeting with M/s GMR, M/s SPC and M/s MPC on 22.06.2012 at 11:00 Hrs in the chamber of the Chief Engineer/PPP/ TANGEDCO/Chennai-2. You are requested to attend the above meeting without fail”.

9.19. The letter from the Respondent to the Petitioner dated 02.08.2012 with regard to maintain the Nil Generation is extracted as follows:-

“M/s Madurai Power Corporation's power plant is maintained at a minimum generation of 13 MW, whenever no dispatch instruction was issued by TANGEDCO. The reason stated by M/s MPC for the minimum generation of 13 MW was that the steam for fuel tank and fuel lines was generated using the flue gas from the running unit to avoid solidification of LSHS. It is learnt that zero MW generation is maintained by similar plants without solidification for considerable period in a day. Hence, based on the interest of an integrated grid operation system in future, it is requested that, whenever TANGEDCO did not dispatch power from your plant, your plant shall maintain zero MW generation”.

9.20. The Telephone message from the Respondent-2 itself evident that the Respondent-2 instructed the Petitioner that in order to perforce the Tariff order No. 1 of 2012, the Petitioner's plant should be maintained at zero generation and if the load is not reduced then TANTRANSCO will be constrained to deduct the energy injected into the grid, and the extract of the Telephone message dated 05.08.2012 is as follows:-

“In continuation to your reply dt 04.08.2012, it is to be intimated that your plant had been kept at zero generation from 11:36 hrs to 23:30 hrs on 13.06.2004. Hence your statement that “The plant is not designed for zero power to keep fuel in liquid condition we have to maintain one engine running minimum load of 13 MW to generate enough steam so as to prevent LSHS become solidified” is not acceptable. Hence please backdown your generation to zero MW from 08:30 hours to 18:30 hours today on 05.08.2012 as carried out on 13.06.2004 and confirm the action taken. Please note that if the generation is not reduced as requested TANTRANSCO will be constrained to deduct the energy injected into the grid during the above period”.

9.21. However, the Petitioner has not obeyed the zero dispatch instructions of SLDC which was issued in line with Merit Order Dispatch instruction of the Commission and continued to generate power and pumped the same into the grid without the dispatch instructions from SLDC. Thereby, Petitioner not only disobeyed the Merit Order Dispatch instructions but also violated the Grid Code.

9.22. Hence, SLDC treated this as an unauthorised injection to the State Grid and disallowed the energy pumped to the grid, in line with sections 33 (1) & (2) of Electricity Act, 2003. SLDC has disallowed certain quantity of energy fed by the Petitioner to grid for non-obeying the dispatch instruction of SLDC. The SLDC's decision is final and binding all the parties. Hence, the prayer of the Petitioner to get payment for the disallowed energy which is clearly unauthorized injection may be dismissed.

9.23. Against the zero dispatch instructions issued by SLDC as per clause 7.1.20 of the TNERC's Tariff order Tariff Order No. 1 of 2012 dated 30.03.2012, this petitioner has filed a DRP No.27 of 2012 before the Commission on 29.12.2012 and the prayer is as follows:

“(a) declare that the Respondents are bound to issue dispatch instructions under the PPA strictly in terms of Article 6.3 thereby disentitling them from issuing part/zero power dispatch instructions under the terms of the PPA between the parties except in the event of an Emergency affecting the Grid system;

(b) Additionally and alternatively in the event zero / part power dispatch instructions are issued and required to be complied with, direct the Respondents to issue such dispatch instructions in accordance with the proposal put forward by the Petitioner in this petition, i.e. such zero power dispatch instructions must be limited to a maximum of 4 hours of zero power followed by a minimum of 8 hours of minimum technical feasible load of 13 MW single engine operation;

- (c) direct the Respondent No.1 to pay all costs arising out of compliance with the zero power instructions including:-
- (i) Cost of fuel by adding energy drawn from the grid by the project during zero power operation to the monthly net export joint meter reading either as per the actual reading taken jointly with the Respondent before and after every zero power operation or in the alternate adopt the Petitioner's estimated energy consumption of 455 kw per hour based on connected auxiliary load to arrive at the net energy delivered by the project with which Gross Actual Energy will be computed for invoicing;
 - (ii) Diesel cost to operate the start-up boiler at the rate of 200 litres of diesel for every hour of zero power dispatch at the prevailing diesel price;
 - (iii) Cost of additional start-up charges towards start-stop due to zero power operation as per Appendix L of the PPA;
 - (iv) deemed generation for the energy made available by the project during the zero power period.
 - (v) liquidated damages payable by the Petitioner under the Fuel Supply Agreement.
 - (vi) Any other costs incurred and directly arising out of compliance with such instructions.
- (d) direct the Respondent to pay all the aforesaid sums promptly within the time prescribed for payments of invoices under the PPA.
- (e) **direct the Respondent not to disallow any energy fed into the grid so long as such supply has been effected when there is no emergency affecting the grid as notified by the State Load Dispatch Centre and consequently make payment in respect of all the energy that has been fed into the grid by the Petitioner.**
- (f) direct the Respondent to allow the operation of at least one single engine at the minimum technical feasible load of 13 MW in case of any failure of the existing start-up boiler since there is no redundancy for the start-up boiler to ensure that the exhaust gas boiler is operated for production of necessary steam to keep the fuel at warm condition.
- (g) direct the Respondent to pay costs”.

9.24. With respect to above prayer (f) of D.R.P No. 27 of 2012, the Respondent has paid the EPC cost in full to the Petitioner to establish the power plant with necessary supporting systems. But, the petitioner states that the power plant was provided only with a 3 Ton/Hour boiler for supplying steam to avoid solidification of LSHS. Apart from the Start up Boiler, the Petitioner's plant was provided with Package Boiler redundant to Start up Boiler. Therefore, the diesel requirement as prayed in C(ii) of DRP 27 of 2012 for operating the start up boiler during zero

dispatch period in respect of the Petitioner's Power Plant has to be met out from the O&M Expenses under fixed charges payment. Hence, as per prudent practice asking this Respondent for compensation by way of seeking approval to operate one unit with 13 MW for steam generation to avoid solidification of LSHS was rejected. Moreover, single engine operation concept suggested by the petitioner is not contemplated in the PPA.

9.25. The above DRP 27 of 2012 filed by the Petitioner and those proceedings were withdrawn in light of the withdrawal of DRP No.27 of 2012 during the hearing held on 14.12.2018 for reasons best known to them.

9.26. Initially, during the processing of the Tariff invoices pertaining to the billing period 11.07.2012 to 11.06.2013 this Respondent-1 has made payments against the respective Tariff invoices. Once SLDC disallowed the energy which was unauthorisedly injected, the energy injected into the grid against the dispatch instructions of SLDC was not accounted for Tariff Billing purpose.

9.27. By violating the SLDC's dispatch instructions, the Petitioner has injected the following quantum of energy during the FY 2012-13 to FY 2013-14 as tabulated below:

Billing Period	Energy disallowed by SLDC in Units
11.07.2012 to 11.08.2012	5,71,950
11.08.2012 to 11.09.2012	23,25,460
11.09.2012 to 11.10.2012	4,45,250
11.10.2012 to 11.11.2012	1,46,250
11.11.2012 to 11.12.2012	71,500
11.12.2012 to 11.01.2013	1,37,583
11.01.2013 to 11.02.2013	2,80,449
11.02.2013 to 11.03.2013	24,917

11.03.2013 to 31.03.2013	0
01.04.2013 to 11.04.2013	0
11.04.2013 to 11.05.2013	1,86,334
11.05.2013 to 11.06.2013	8,74,250
Total	50,63,943

9.27. Since, TANGEDCO is making payment of the monthly invoices based on the energy certified by SLDC, the Respondent had requested the Petitioner to issue credit notes to account for unauthorised energy and the Petitioner disinclined to do so.

9.28. The Petitioner has not approached the Commission seeking remedy for clause 7.1.20 of the Tariff Order dated 30.03.2012, or appealed against it and therefore estopped to file this DRP.

9.29. This is not the dispute at all and it does not fall within the purview of the PPA. These directions or instructions which the Respondent-2 has given are legalized for which the Petitioner is not entitled for payments and he cannot claim and ask for equity for their fault.

9.30. Once the zero dispatch instruction received from SLDC, the Petitioner has to come to zero. But in Contra the Petitioner's plant has been injecting power into the grid unauthorisedly, without the dispatch instructions of SLDC and are claiming benefit for which he has faulted. The injection of Power into the grid was erroneous, unauthorized and in violation of SLDC's dispatch order.

9.31. As per section 32 (2) (c) of the Electricity Act, 2003, SLDC is the authority to keep accounts of the quantity of electricity transmitted through the State grid and in turn certifies the quantum of energy fed to the grid by each generator. Since, this Respondent was making monthly tariff invoice payments to the Petitioner's power plant based on the quantum of energy so certified by SLDC.

9.32. Hence, to perforce the energy disallowed by SLDC, the Respondent requested the Petitioner to issue credit notes to adjust the payments which they are not entitled for due to violation of Zero dispatch instructions. Once the Petitioner disinclined to do so, the Respondent deducted the payments, which was made towards the unauthorized energy injected and it cannot be construed as dispute in the PPA. The unauthorized energy fed into the grid by the Petitioner was disallowed by SLDC and not accounted for in the Tariff Billing.

9.33. The pay and dispute clause, i.e., clause 8.3(d) of PPA, relied by the Petitioner will not apply to the unauthorized energy injected into the grid, which does not form part of Tariff invoice. Further, there is no provision in the PPA for the payment of unauthorized energy injected into the grid.

9.34. Moreover, there is no place for purchase of power from Petitioner's Plant in the Merit Order Ranking prescribed by Commission in Tariff order for the year 2012 and 2013. The Commission's Tariff Order supersedes the provisions of the PPA for 85% dispatch of the Petitioner's power plant. Hence, the Petitioner cannot claim dispatch of 85% power from this power plant. Further, the Respondent is protected by Force Majeure article of the PPA.

9.35. The Petitioner has unauthorisedly and in violation of dispatch orders injected power for which the Petitioner says he is entitled to. Once, if the Commission allows this application he would be paid in premium for all the violations or could be giving the go-bye to the Tariff orders and dispatch instructions.

9.36. SLDC's instruction to inject power or to maintain the good discipline cannot be questioned and it is been settled. SLDC dispatch orders are to be obeyed

scrupulously and abided by. In para 18 of the Petition, the petitioner attributes malafide on collusion between the 1st respondent and SLDC and is extracted as follows:

“.....It is submitted that the SLDC instead of independently following and complying with the Grid Code & Regulations is acting in conjunction with the 1st Respondent and to the detriment of the petitioner though it is an independent body required to be neutral”. It is evident that the 1st Respondent is also acting under the dictates of the SLDC as its letter dated 01.11.2013 clearly reveal that after making payment for the power dispatched, they have thereafter sought to recover the same under the dictates of the SLDC”.....

9.37. The Petitioner alleged that in collusion with first respondent SLDC gave some dispatch orders which acted and detriment to the Petitioner. These dispatch orders have not been challenged not been questioned at any point in time what contra without doing it the Petitioner's contention is that he will not abide by the SLDC dispatch orders and continues to inject power for which the Respondent-1 had made payments and these payments cannot be deducted.

9.38. When the injection of power itself is in violation of SLDC's direction irrespective of the factum whether the 1st respondent and SLDC acted in Collusion or not, dispatch instructions issued by SLDC has not been challenged by the Petitioner. Can the Petitioner be paid the premium by the Respondent for all the faults or for all the violations done by them.

9.39 It is not in dispute, the deductions are equivalent to the power which is injected unauthorisedly or in violation of SLDC's order. There is not a single ground to show only a portion of this would translate it into amount, on only this injection of power and a portion of this unauthorisedly injected power exceeded what the Respondent has deducted.

9.40. The Petitioner has not disputed the quantum of power which was unauthorisedly injected by them and disallowed by SLDC. Whatever the power which has been unauthorisedly injected and the payments made correspondingly has been deducted by the Respondent-1.

9.41. Moreover, if unauthorized injection is permitted it will set a wrong precedence and result in much more illegal injections by which the safety of the grid is endangered.

9.42. M/s. GMR Power Corporation Limited, another Independent Power Producer who is supplying power to this Respondent with a Power Purchase Agreement, had filed Appeal No.127 of 2012 during July 2012, before Hon'ble Appellate Tribunal for Electricity against the order of the Commission dated 21.06.2012 in M.P.No 11 of 2012, based on the prayer of the Respondent for dispatching M/s GMR and other high cost IPPs outside merit order for the month of April to June 2012. The prayer of the Appeal No.127 of 2012 is as follows:

- (a) "Stay the operation of the impugned order dated 21.06.2012"*
- (b) Stay the operation of the direction at para 7.1.20 of the impugned Tariff order dated 30.03.2012 for prior permission of the TNERC for scheduling of power from Power stations outside merit order*
- (c) Direct the Respondent No.2 to continue purchasing Power from the Appellant in terms of PPA during the pendency of Appeal".*

9.43. The Hon'ble APTEL, New Delhi in its order dated 14.08.2012 had dismissed the appeal and observed as follows:

Para 7. "We find that the directions relating to merit order operation have been issued by the State Commission in the Tariff Order dated 30.03.2012. which was passed after notice inviting objections and conducting public hearings on 30.01.2012, 02.02.2012, 06.02.2012. and 10.02.2012, as per Sec 64 of the Electricity Act, 2003. The impugned order dated 21.06.2012 was for approval and ratification of operation of certain IPPs including the Appellant's power plant outside the Merit Order for the

months of April ,May and June ,2012 pursuant to the directions given in the Tariff Order dated 30.03.2012.

Para 8. "The Appellant has not challenged Tariff Order dated 30.03.2012 in which the directions relating to merit order were given .The proceedings that culminated with the impugned order dated 21.06.2012 was only in compliance of the directions given in the Tariff order dated 30.03.2012."

Para 9." In the impugned order dated 21.06.2012, the State Commission has approved the prayer of Respondent no 2 for ratification of operation of some IPPs including the Appellant's power plant outside the Merit Order during the period April-June ,2012.The Respondent no 2 has not challenged the said order. In the impugned order dated 21.06.2012, the State Commission has only reiterated the directions which were given in the Tariff order dated 30.03.2012, following the Merit Order operation".

9.44.A person who has violated a norm or rule and made a fault claim based on the above cannot be benefited. Hence, based on the above ground this Petition is not maintainable and liable to be dismissed.

9.45. The petition is hit by the principles of Resjudicata and is not maintainable. Earlier DRP 27 of 2012 was filed by the Petitioner and those proceedings were withdrawn in light of the withdrawal of DRP No.27 of 2012 during the hearing held on 14.12.2018 for reasons best known to them. Having withdrawn the substantive D.R.P. which challenged the zero despatch instructions and seeking payment for all energy fed into the grid without seeking any liberty, it is not open to the petitioner to seek the same relief in a collateral proceeding which have been filed and it is hit by the principles of resjudicata and is not maintainable. Alternatively, the Petitioner is estopped from raising the same relief in the instant petition. The Respondent relies upon the judgment of *Sarguja Transport Service v. State Transport Appellate Tribunal*, AIR 1987 SC 88.

9.46. Against the zero dispatch instructions issued by SLDC as per clause 7.1.20 of the TNERC's Tariff order Tariff Order No. 1 of 2012 dated 30.03.2012, this

petitioner has filed a DRP No.27 of 2012 before the Commission. One of the prayer of the Petitioner in the DRP No.27 of 2012 was-

Prayer “e. direct the Respondent to not to disallow any energy fed into the grid so long as such supply has been effected when there is no emergency affecting the grid as notified by the State Load Dispatch Centre and consequently make payment in respect of all energy that has been fed into the grid by the Petitioner ”

9.47. When conjoint reading of one of the prayer of above DRP with the prayer of DRP No.66 of 2014, it is evident that the later DRP is the collateral proceedings of DRP No.27 of 2012. This Petitioner subsequently withdrew DRP No. 27 of 2012 during the hearing held on 14.12.2018 for stating reason that PPA period expired and the petition become infructuous.

9.48. It is evident from the following that DRP No. 66 of 2014 is the collateral proceedings of DRP No.27 of 2012. Both the DRP proceedings relating to “0” dispatch instructions and concerned to disallowance of energy during zero dispatch instructions. The relevant extract of the letter dated 12.08.2013 from the Petitioner to the Respondent-1 is as follows:

“3. You are also aware that the Hon’ble TNERC has specifically noted the pendency of the DRP relating to zero dispatch instructions and has ordered in para 2.217 that the matters concerned to payment obligations or applicability of Articles of a bilateral PPA are outside the purview of the Tariff petition. The Hon’ble TNERC has also recognized that approval for dispatch outside merit order is to be obtained by TANGEDCO.

4. In view of the above there is no basis for your claim that a Credit note is to be issued. In any event all of the issues in this regard for pending adjudication in D.R.P No. 27 of 2012 and you are called upon to wait adjudication of the same”.

9.49. Further, the letter dated 17.09.2013 from the Petitioner to the Respondent-1 is as follows:

“...TANGEDCO have now advised that the variable cost on account of the units generated and fed into the grid during the period of nil generation amounting to Rs.5,42,57,499/-, without details relating to the same, would be deducted.

Since the matter of zero power dispatch instructions issued by TANGEDCO is already pending before TNERC under D.R.P No. 27 of 2012 for adjudication, we stress upon to TANGEDCO that no amount be deducted against our Tariff bill on account of disallowed units till the adjudication of Hon’ble TNERC in an ability in D.R.P No. 27 of 2012.....”.

9.50. From the above letters it is evident that the Petitioner informed the Respondent that the disallowance of the units should be kept in abeyance and no amount be deducted against our Tariff bill on account of disallowed units till the adjudication of the TNERC in an ability in D.R.P No. 27 of 2012. But simply withdrawn the DRP 27 of 2012 without seeking any liberty, it is not open to the petitioner to seek the same relief in a collateral proceeding. In contra, now the Petitioner raises of specific ground in para 29 and 30 of the Rejoinder as follows:

“Para 29 & 30 of Rejoinder:

Reference by the 1st respondent to the DRP No.27 of 2012 filed by the petitioner on 06-12-2012 and withdrawal of the same on 14.12.2018 does not have relevance to the current petition as per the detailed reasoning given below:

(a)DRP No.27 of 2012 included multiple issues which were in principle connected to the directions for maintenance of generation under certain circumstances. Since the PPA period itself stood expired without an adjudication, the petition became infructuous. Therefore it is incorrect to claim that the said proceedings are substantive proceedings for the purposes of this claim.....”

9.51. Assuming if the deductions were not made, the earlier letters which were challenged in 27 of 2012 were in line with the prayer of D.R.P No. 66 of 2014. Whether simply having withdrawn DRP No.27 of 2012 without seeking any liberty and later filed D.R.P. No 66 of 2014 with collateral proceedings, would the DRP No. 66 of 2014 is maintainable and fortified by the decisions of the supreme court. The

principles of Resjudicata will be hit and the petitioner cannot maintain this petition since, both the petitions are identical.

9.52.The Commission in the Tariff Order No. 1 of 2012 dated 30.03.2012, vide clause 7.1. prescribed the Merit Order Ranking for dispatch of power by TANGEDCO on least cost basis. According to clause 7.1.20 of Tariff order, the TNERC listed the Petitioner's plant under the list of plants which are not scheduled as per Merit Order Despatch, since the variable cost of the Petitioner's plant was very high.

9.53.The Merit Order Ranking notified by the Commission vide para 7.1.20 in Tariff Order No.1 dated 30.03.2012 comes under the Direct Indian Political Event of Force Majeure clause of PPA.

e. Under Article-12 Force Majeure, the payment obligation will be as per Article 12.4.a (i) which is as follows:

“..... for Direct Indian Political Event the Project is deemed to be operating at the NPLF and full fixed charge payment shall be paid by TNEB.....”

9.54.According to the above provisions of the PPA, the payment obligations to TANGEDCO covers only full Fixed Charge Payment. It is clearly established, that the “Zero dispatch” is a Force Majeure event as per the articles of PPA described above and as long as fixed charge payment is made by the 1st respondent, it has complied with the PPA.

9.55.Further Article- 12.5.'Other consequences' of PPA states as follows:

(a) “.....Except as otherwise provided in this Article 12, neither Party shall be responsible or liable for any breach or deemed breach of this Agreement due to its failure or delay in performing its obligations hereunder

due to an event of Force Majeure for such period as the event of Force Majeure continues“.....

9.56. The Respondent had filed an application before the Commission on 19-02-2013 for final true-up and approval of Aggregate Revenue Requirement (ARR) for the year 2010-11, provisional true-up and approval of ARR for the year 2011-12 and its Multi Year Tariff petition for 2013-14 to 2015-16. The Petitioner has raised issues/objections against issuance of zero dispatch instructions by SLDC under stakeholder comments before the Commission. The response of the Respondent and the observations of the Commission on the issues are as follows:

“Stakeholder Comments

2.198 SPCL and MPCL both have subsisting Power Purchase Agreements with TANGEDCO for supply of power from their power plants which operate on Low Sulphur Heavy Stock/Low Sulphur Furnace Oil.

2.199 SPCL and MPCL in their detailed comments mentioned that TANGEDCO has sought for approval of only fixed costs of the respective plants which is contrary to the provisions of PPAs in existence. They pointed out that TANGEDCO has to operate the power plants in accordance with the Article 6.3 of PPA.

2.200 They have been cooperating with TANGEDCO in operating the plant at technically feasible minimum load of 13MW to keep the fuel warm.

2.201 SPCL is totally dependent on TANGEDCO as TANGEDCO is the sole purchaser of power and has referred to various clauses of PPA. TANGEDCO cannot issue zero power instructions as per PPA provisions

2.202 Both have stated that both they have filed petitions DRP 26 and DRP 27 of 2012 seeking an order restraining TANGEDCO from

issuing instructions to SPCL to back down generation of SPCL and MPCL plants. The petition has been heard by the Commission and pending for admission

2.203 TANGEDCO has been dispatching the plant to meet its immediate requirements and has at times issued zero dispatch instructions without regard to the technical requirements of the plants.

2.204 SPCL and MPCL have requested the Commission to consider appropriate variable cost for plants as per the PPAs. Order that the approved tariff is subject to the decision of the Commission in DRP 27 of 2012 filed by MPC. Alternatively, if zero / part power dispatch instructions is issued by TANGEDCO, it should be limited to max of 4 hrs of zero power followed by a minimum of 8 hrs of technical feasible load of 13 MW single engine operation.

TANGEDCO's Reply

2.205 Hon'ble TNERC in accordance with above Terms and Conditions of Tariff Regulations, has determined the power purchase cost and gave the Merit Order Ranking for all available sources from which energy is available in FY 2012-13 under Table 192 of Tariff order dated 30.03.2012. According to clause 7.1.2.f. of Tariff order, Hon'ble TNERC listed M/s PPN, M/s SPCL, M/s MPCL & M/s GMR under the plants which are not scheduled as per Merit Order Dispatch, with a liberty to approach Commission in advance if they are dispatched outside Merit order.

2.206 Based on the above Tariff order and Grid Code of Hon'ble Commission, M/s SPC and M/s MPC are being given zero dispatch

instruction from 01.04.2012 till date, based on the merit order dispatch by SLDC. During the zero dispatch period, M/s SPC and M/s MPC are allowed fixed charges only, as directed by Commission.

2.207 Further, whenever there is a shortage of power, M/s SPC and M/s MPC are being dispatched outside merit order by SLDC, and ratification / approval of this dispatch is obtained from the Hon'ble Commission then and there by TANGEDCO.

2.208 Against the zero dispatch instructions issued by SLDC as per Hon'ble TNERC's Tariff order, M/s SPC & M/s MPC have raised certain disputes such as directing TANGEDCO to issue dispatch instructions based on the PPA, to pay the cost of additional start – stop due to zero power generation, cost of additional fuel for start-up boiler during zero dispatch etc and filed a DRP before the Hon'ble TNERC vide DRP No.26 of 2012 and DRP No. 27 of 2012 and the DRPs are yet to be admitted by the Commission. Preliminary objection has been filed by the TANGEDCO in the above DRPs.

2.209 As per Article 12 of the PPA on Force Majeure and specified that directions of Hon'ble Commission in Tariff Order No.1 dated 30.03.2012 vide para 7.1.20, fall under the Direct Indian Political Event of Force majeure Clause of PPA and therefore Zero dispatch of power from M/s SPC or M/s MPC is not in violation of the terms of PPA, as explained above.

2.210 Having established the zero dispatch concept under Force Majeure, now the payment obligation of TANGEDCO during such Force Majeure shall be dealt, which is as follows:

Article.12.4 Continuing Payment Obligation: Force Majeure of PPA provides as below:

a)“Upon the occurrence and during the continuance of any event of force Majeure, the Tariff and all other payment obligations of the Parties hereunder shall continue to be payable as set forth below:

i)for Direct Indian Political Event the project is deemed to be operating at the NPLF and full Fixed Charge Payment shall be paid by TNEB”

2.211 In FY 2013-14 when compared to FY 2012-13, the variable costs of M/s SPC or M/s MPC is not likely to come down, but it is likely to increase only, taking market trend of liquid fuel into consideration.

2.212 In view of the reasons explained above, for this FY 13-14 also, TANGEDCO has filed Tariff Petition & ARR mentioning zero dispatch for the high cost IPPs namely MPC, SPC, GMR & PPN.

Commission’s View

2.213 Regulation 75(1) of the TNERC (Terms and Condition for Determination of Tariff) Regulation 2005, specify the following: “The Distribution Licensee shall procure power on least cost basis and strictly on Merit Order Despatch and shall have flexibility to procure power from any source in the country”.

2.214 Similar provision exists in the Tamil Nadu Electricity Grid Code as well as in Electricity Act 2003.

2.215 In line with the provisions mentioned above Commission adopted the same approach to allow the costs in its Orders TO No 3 of 2010 and TO NO 1 of 2012. In the matter of the above mentioned orders, neither

TANGEDCO nor the petitioners have raised any objections previously on the applicability of merit order principles to their plants.

2.216 Commission understands that the issue of finding alternative for meeting the heating requirement of fuel pipes and tanks etc in the event of Nil generation, is being taken up with the IPPs by TANGEDCO so as to strictly follow the Commission's tariff order No. 1 of 2012 dated 30-3-2012 as submitted by TANGEDCO in the matter of petition MP No 23 of 2012.

2.217 In addition the matters concerned to payment obligations or applicability of Articles of a bilateral PPA are outside the purview of this petition. Hence the Commission decides that the power purchase quantum for the second control period from M/s SPCL and M/s MPCL will continue to be governed by Merit Order Despatch principles.

2.218 In cases where the Power Stations are to be despatched outside Merit Order, TANGEDCO shall obtain approval of the Commission in advance by furnishing reasons for such action. In case of emergencies TANGEDCO is permitted to resort to such a practice but will approach the Commission within a week of such action along with the reasons for such action.

2.219 MoD for the specific stakeholders viz M/s SPCL and M/s MPCL has been in vogue from 1st April 2012. No specific violation of PPA has been cited by them and a direction is being sought to follow the PPA. Alternatively a scheme of despatch is proposed. Section 32(2)(a) of E-Act 2003 states that "The State Load Despatch Centre shall - (a) be

responsible for optimum scheduling and despatch of electricity within a State, in accordance with the contracts entered into with the licensees or the generating companies operating in that State;” There is no merit for any direction from the Commission for following the provisions of law. As and when there is a cause of action, the Petitioner may approach the Commission for specific relief”.

9.57. It is clear that the ‘zero’ dispatch instruction issued by SLDC to the Petitioner’s power plant under Merit Order Ranking of the Commission’s Tariff Order does not amount to violation of the PPA.

9.58. Since the Respondent had fulfilled its obligation of full payment of fixed charges to the Petitioner during ‘zero’ dispatch period under Article 12.4 of the PPA, the Petitioner cannot claim any other relief under Article 12.5 of PPA.

9.59. Tariff Order 1 of 2013 dated 20.06.2013 came into effect from 21.06.2013, whereas the Dispute period represented in this petition covers the period 15.07.2012 to 15.06.2013 covered under the purview of Tariff Order T.O.No.1 of 2012. Hence, the Tariff Order No 1 of 2013 dated 20.06.2013 is not applicable to this DRP No.66 of 2014 filed by petitioner.

9.60. The Petitioner wants to take shelter in Tariff order 2013 in clause 2.219. In accordance with this Specific Relief or whatever the lean which has been granted, this petition has not been filed. If they wanted to increase or they want to have some role or challenge to the merit order no challenge has been done. That lean has been granted under the guise of this lean the whatever the payments which have been deducted for unauthorized injection now they are challenging it.

9.61. Under the 2013 tariff order as set this is not a dispute which is arising under the PPA, there could not be any violation of the terms of PPA or any merit order dispatch issued by SLDC. If there is any requirement or any need to have 13 megawatt for maintenance or little more, then that only could be claimed by the Petitioner under the specific relief. The scope of the petition is that having injected power unauthorisedly to the grid the Petitioner had every right for the payment made towards the unauthorisedly injected power and the same did not be deducted. Therefore, without challenging the Tariff Orders of 2012 and 2013 and SLDC's dispatch orders, the Petition has been filed and the same is not maintainable. If the Petitioner has in violation of all the three, injected power unauthorisedly and in law they are not entitled to claim their rights on the payments made.

9.62. There is no challenge to SLDC's dispatch orders. The Tamil Nadu Electricity Grid Code dated 10.12.2005 issued by the Commission states as follows:

“Clause 10 : Non compliance and disputes- (1) As stipulated under Section 33 (2), (4) and (5) of the Act, every licensee, generating company, generating station, substation and any other person connected with the operation of the power system shall comply with the directions issued by SLDC. If any dispute arises with reference to the quality of electricity or safe, secure and integrated operation of the State Grid or in relation to any direction given by SLDC, it shall be referred to the Commission for decision. Pending decision of the Commission the licensee or the generating company shall comply with the directions of the SLDC.....”

9.63 According to the above provisions of the Grid Code, if the Petitioner was aggrieved by Zero power dispatch instructions of SLDC, they ought to have approached the Commission only after obeying the dispatch instructions of SLDC. Only after complying with the directions of SLDC alone the Petitioner could have come to the commission and pray to set aside the merit order and seek for specific

relief. Since, this has not been adhered to, therefore all counts this petition is not maintainable.

9.64. Nothing has been made out for refund of the monies which have been deducted, the deduction is not arbitrary or irrational. This Respondent has followed the Commission's tariff orders and followed the laws scrupulously and a person who has not at all followed or adhered to it cannot be given premium of the payments.

9.65 The Energy injected by the IPPs have to be certified as per the schedule /despatch instructions issued for every month by the SLDC as per the above sections of the Electricity Act, 2003 and it is the duty of SLDC to disallow any unauthorized injection of power to TN Grid while verifying the same.

9.66.If unauthorized injection is permitted it will result in creation of wrong precedence and result in much more illegal injections.

9.67.The onus is on the Petitioner to demonstrate before the Commission and show which dates or on when the zero dispatch instructions were given to the Petitioner and how was it done and under which act of this Respondent has resulted in incurring the costs.

9.68.The Petitioner Company was issued "zero" MW request for continuously 959 Hours during 17.07.13 to 26.08.13, they were able to follow the instructions and no untoward incidents had occurred.

9.69 In the appeal filed by M/s Kamachi Sponge before Hon'ble APTEL, the Hon'ble Tribunal in its order dated 08.05.2017 in Appeal No.120 of 2016 & IA No.272 of 2016 upheld the above order of the Commission observed as follows:

“para 10 (I)(iv): The Respondent No. 1 had also quoted two more judgements of this Tribunal in Appeal nos.267 of 2014 and Appeal no. 68 of 2014. In the judgement dated 15.4.2015 in Appeal no. 267 of 2014 this Tribunal has held that the Appellant (M/s Cauvery Power Generation Pvt. Ltd.) is not entitled to claim payment of infirm power injected into the grid without the approval from the Respondent (TANGEDCO) for specific duration as mentioned in the judgement till TANGEDCO conveyed its consent to purchase infirm power. In the judgement dated 30.5.2016 in Appeal no. 68 of 2014 this Tribunal has disallowed the payment by Respondent (TANGEDCO) towards injection of power from COD of the Appellant (M/s OPG Power Generation Pvt. Ltd.) till approval of third party sales by TANTRANSCO as the energy was injected to the grid without the consent/knowledge of the distribution licensee and SLDC. The crux of these two judgments is also that a generator cannot pump electricity into the grid without having consent/ contractual agreement with the distribution licensee and without the approval/scheduling of the power by the SLDC. Injection of such energy by a generator is not entitled for any payments”

9.70.The Hon'ble Supreme Court in its order dated 15.01.2018 in Civil Appeal No.13335-13336 of 2015 and Civil Appeal No.4417 of 2016 in the matter of M/s OPG Power Vs. TANGEDCO and M/s Cauvery Power Generation respectively, dismissed the civil appeals and directed below:

*“Heard the learned counsel appearing for the appellant(s).
We do not find any reason to interfere with the impugned orders dated 29.11.2014 and 15.04.2015 passed by the Appellate Tribunal for Electricity, New Delhi.
In view of this, we find no merit in the appeals. Accordingly, the appeals are dismissed.”*

Therefore, the victim of APTEL after considering it consciously set out the facts and set out what the judgment even if it is to be construed as arbiter or observation / biding an unauthorized injection of power no benefit can be accrued or can be made on equity and on law. On both aspects the petition is failed and it is liable to be dismissed.

9.71.In the present case, also the petitioner had injected energy without any schedule/dispatch instructions, and therefore the unauthorized injection of energy

against IEGC shall not be accounted. However, such injection of power is to be discouraged in the interest of secure and economic operation of the grid.

9.72 Ultimately this Commission is the Regulating authority which has got the regulating power. As a Regulator, the functions of Commission as set out in the Act and rules made there under and in particular, to,

“(iii) regulate electricity purchase and procurement process of distribution licensees including the price at which the electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the state”.

9.73. Given the fact that the case involves a monetary claim and the effect of the award in terms of the claim will have to be absorbed on the financials of the Licensee and ultimately the same will have a bearing in the retail tariff and passed on to the consumers.

9.74. Considering the above facts and circumstances, the petitioner is not entitled to claim Rs.5,82,71,744/- and interest towards energy injected into Grid without any schedule/dispatch instructions.

9.75. Moreover, the Petitioner's reliance on the concept of 'business efficacy' to support its contention does not apply to the case on hand since the Agreements here are tailored made and vary with each generator and based on the requirement of power at large. Express terms of the contract bind the parties and the terms cannot be implied to suit the Petitioner.

10. Written Submissions filed on behalf of the 2nd Respondent:-

10.1 This Written Submission is filed on behalf of the 2nd respondent as directed by the Commission vide its Daily Order dated 03-02-2021.

10.2. The petitioner M/s. Samalpatti Power Company Private Ltd., Independent Power Producer (IPP) having generation capacity of 105.66 MW (LSHS Fuel) had Long Term Power Purchase Agreement (PPA) with the 1st respondent, Tamil Nadu Generation and Distribution Corporation Ltd., for 15 years from COD date of 01-03-2001 which was expired on 29-02-2016.

10.3. Based on the Merit Order Despatch Principles, the Petitioner's Generating company is being issued "0" (zero) MW dispatch instruction whenever grid condition warrants, with the condition, that if any energy injected into the grid, during "0" MW dispatch instructions, the same would not be accounted.

10.4. The petitioner had injected power into TN Grid in violation of the aforesaid "0" (zero) MW despatch instructions issued by the 2nd respondent (SLDC) during the period from July 2012 to June 2013. Since, the 2nd respondent, is an authority for energy accounting as per Sections, 32 and 33 of Electricity Act, 2003, the unauthorized injection of energy of 50.64 MU by the petitioner was not certified by the 2nd respondent for making payment by the first Respondent.

10.5. As per Section 32 & 33 of Electricity Act, 2003 and as per Clause 2.7, 5.2(m), 5.4.2(a), 6.4.6, 6.4.7 of Indian Electricity Grid Code (IEGC), Clause 3(4), 4.2(e), 8.4 (iii) and (v) of Tamil Nadu Electricity Grid code (TNEGC), SLDC is maintaining the TN Grid to provide continuous quality power supply to the common

public throughout the State by maintaining Grid discipline without any major disturbance based on the Merit Order Despatch principles as notified by the Commission from time to time.

10.6. The Clause 8.4.(iii) of the Tamil Nadu Electricity Grid Code is pertinent to this case and the same is reproduced as below:

" The generating stations shall be responsible for power generation generally according to the daily schedule provided to them by the SLDC on the basis of the drawal schedules received from the beneficiaries / distribution licensee and also in accordance with Merit Order Despatch and Connectivity Agreements. However; the generating stations may deviate from the given schedules depending on the plant and system conditions with the prior approval from SLDC."

Hence, it is the responsibility of the generators to maintain their generation in line with the SLDC instructions.

10.7. The 2nd Respondent is following the Merit Order Despatch Principles as notified by the Commission vide Clause 4.1.91 of the Tariff Order No.1 of 2012 dated 30.03.2012, the same is reproduced for convenience:-

"4.1.91. For FY 2012-13, the Commission observed that TANGEDCO has projected less energy availability from GMR PCL as compared to Samalpatti PPCL and Madurai PPCL. The Commission has considered the power purchase quantum as submitted by TANGEDCO in the Petition. However, the Commission notes that the energy available from all the three stations is much higher if PLF corresponding to full cost recovery is considered. During advanced operation, interse Merit Order Despatch shall be followed for despatching the stations. The Commission has allowed the power to be purchased from IPPs on the basis of Merit Order Despatch for FY 2012-13."

10.8. The 2nd respondent, ensuring economic grid operation and complying the foresaid directions of the Commission, 'Nil' generation instructions were issued to the petitioner's plant as and when the security of TN grid conditions warranted as

per the Merit Order Despatch. Accordingly, in compliance with the directions of the Commission, the 2nd respondent is scheduling the high cost power of the petitioner's plant economically and thus the compliance of the Regulatory provisions are ensured.

10.9. In D.R.P. No. 12 of 2011 filled by M/s. OPG Power Generation Pvt. Ltd., the Commission vide order dated 07.10.2011 has followed the Appellate Tribunal for Electricity (ATE) order dated 16.05.2011 made in Appeal No. 123 of 2010 in the matter of M/s. Indo Rama Synthetics (I) Ltd., Nagpur Vs Maharashtra Electricity Regulatory Commission and others. The operative portion of the order of ATE in Para 13, which is relevant, is reproduced below:

"Thus, we do not find any substance in the claim of the Appellant for compensation for the power injected into the grid without any schedule and agreement."

10.10. Also the Commission in the D.R.P. No. 12 of 2011 filled by M/s. OPG Power Generation Pvt. Ltd., has observed as hereunder:-

"No compensation is payable to the petitioner for the energy injected into the grid in the absence of approval of open access. Further no compensation is payable to the petitioner for the energy injected into the grid in the absence of any agreement for sale of power and scheduling of energy for injection into the grid based on such agreement."

10.11. The Appellate Tribunal for Electricity in its order dated 16-05-2011 in Appeal No.123 of 2010 filed by M/s.Indo Rama Synthetics (I) Ltd., Nagpur Vs. Maharashtra Electricity Regulatory Commission and others held that any injection, without valid contract and or complying with scheduling requirements as per prevalent procedures for scheduling and dispatch, would not in principle be in the interest of disciplined operations of the grid which is of paramount concern from the

perspective of reliable and safe operations of the Grid. If a generator connected to the grid injects power into the grid without a schedule, the same will be consumed in the grid even without the knowledge or consent of the distribution licensees. However, such injection of power is to be discouraged in the interest of secure and economic operation of the grid.

10.12. The quantum of energy injected into the grid in the absence of scheduling instruction, is unauthorized injection which make the petitioner liable to pay penal charges. Such injection of unauthorized power by the petitioner is in violation of the Grid Code and the provisions of Electricity Act, 2003. Therefore, according to Section 33 (5) of the Electricity Act, 2003, the State Commission may impose penal charges (Rs.5 lakhs per violation) on the petitioner for an amount of Rs.4.30Crores (Rupees four crore and thirty lakhs only) to be paid to SLDC for 86 Nos. of violations committed by the petitioner during the period from July-2012 to June-2013.

10.13. In accordance with provisions of the Electricity Act, 2003, Grid Code, Commission's / APTEL's order and considering the technical and commercial implications of not maintaining the generation in line with the schedule and the submissions above, the D.R.P.No. 66 of 2014 deserves to be dismissed and also to direct the petitioner to pay a sum of Rs.4.30Crores (Rupees Four Crore and thirty lakhs only) for the violation of Section 33 of the Electricity Act, 2003.

11. Findings of Commission:-

11.1. The prayer of the petitioner in this petition is to set aside the deduction made by the 1st Respondent for an amount of Rs.5,82,71,744/- from the invoices of the petitioner and to direct the 1st respondent to make the payment of the said amount together with the interest of Rs.51,22,349/- towards the supply of power for the period from July 2012 to June 2013 during which the State Load Despatch Centre (2nd Respondent) had not instructed to dispatch the power.

11.2. The petitioner states that prior to July 2012, the 2nd Respondent, once in a while used to direct the Petitioner to zero down the generation and thereafter based on the technical justification given by the Petitioner, the 2nd Respondent used to direct the Petitioner to restore generation to a minimum of 13 MW with one engine. However from August 2012, 2nd respondent had been issuing zero power dispatch instructions regularly for adherence by the Petitioner apparently pursuant to the Merit Order Dispatch (MOD) regime which has been notified by the Commission. However, the Petitioner claims that MOD would not alter the obligations of the parties under PPA and the Respondent is bound by itself to not to issue part-load dispatch instructions other than as expressly provided in Article 6.3(b) of the PPA.

11.3. The petitioner further states that there are technical constraints in continuously operating the plants at NIL generation for longer duration. The petitioner also brings to the notice of the respondent that its plant is not designed to handle unplanned stoppages for considerable period in a day and will lead to solidification of fuel; and has also drawn the attention to the provisions of the PPA to issue dispatch instructions at all times to ensure that the plant is running at 85% PLF. In order to handle the zero power situations, the petitioner has taken up the

issue with the Respondent, and states that the complete steam requirement of the plant is met with exhaust gas boilers fitted on the engines. In case of 'zero power dispatch', no steam will be available to meet the requirement. Hence it is essential to supply steam through the operation of the oil fired boiler to meet the steam requirement of the plant during zero power. The plant is having a 3 ton capacity oil fired Start-up boiler available at the plant which is meant for stop-gap arrangement / emergency use in case of a Black-start situation. However to meet the persistent demand of TANGEDCO for zero power operation, the Boiler can be tried out a stop-gap measure for steam generation, but the reliability of the Boiler cannot be assured. Further, the Petitioner has given a suggestion to install a package boiler of 4 ton capacity at the Respondent's cost. Although discussions were held between both the parties in this regard, no agreement was reached.

11.4. In these circumstances, certain units were disallowed by the 1st Respondent for payment when the power was injected into 2nd Respondent's grid during zero dispatch instructions. Though all the invoices were paid initially in full, the settled claim towards variable cost were deducted from the tariff invoice for the billing period (i) 11.7.2013 to 11.8.2013 and the interest was deducted from the tariff invoice for the period from 11.8.2013 to 11.9.2013.

11.5. The Respondent contends that the Commission in the Tariff Order No.1 of 2012 dated 30.3.2012 vide clause 7.1 prescribed the Merit Order Ranking for dispatch of power by TANGEDCO on least cost basis. According to clause 7.1.2 (f) of the said Tariff Order, the petitioner's Power plant does not come under the list of plants which are to be scheduled as per Merit Order dispatch, since the variable

cost of the Petitioner's plant was very high. The respondent had to dispatch power only from the generators under Merit order list. Therefore the petitioner's power plant had to be maintained at zero power generation and any need to meet the grid demand from the generators not in the MOD lists, the Licensee has to obtain prior approval from the Commission as per para 7.1.2. (g) of the Tariff order under reference.

11.6. TANGEDCO further states that the Petitioner was given zero dispatch instruction from 01.04.2012 onwards based on the Merit Order Dispatch by SLDC and during this zero scheduling period, the petitioner plant was allowed with 'Fixed charges'. According to requirement of grid condition, as and when power was required from the Petitioner's power plant, the Respondent had filed Miscellaneous Petitions for dispatching of power from the petitioner's plant and got approved. State Load Dispatch Centre, in adherence to T.O., maintained the zero scheduling in the case of the petitioner. But the petitioner did not obey the zero dispatch instructions of SLDC which was issued in line with the MOD and continued to generate the power and pump the same into the grid. The reason stated by the petitioner was that they needed steam for keeping the LSHS in liquid condition. This practice of injection of power which is quantified to around 50,63,943 Units was disallowed by the SLDC and subsequently by the TANGEDCO.

Issue – 1 :

Whether the zero dispatch instruction which have been issued has the sanctity of law or the regulations made thereunder?

Let us examine the relevant provisions of the Electricity Act:-

11.7. The Commission is vested with the power to regulate the electricity purchase / procurement by the Licensee, in exercise of Section 86 (b) of the Electricity Act, 2003 which provides as follows: –

“86. Functions of State Commission.

XXXX XXXX

(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State; ...”

In accordance with the TNERC’s (Determination of Tariff) Regulations 2005, the Commission carries out the tariff determination process. Regulation 75 of the said Regulation provides for the cost of power purchase in the following terms; -

“75. Cost of Power Purchase

(1) The Distribution licensee shall procure power on least cost basis and strictly on merit order despatch and shall have flexibility to procure power from any source in the country. ...”

It is to be noted that Regulation 75 as stated above, being a subordinate legislation has acquired the status of law and until the same remains on the legislative scheme without any challenge thereto, the same has the force of law and both the second and first respondents are bound by it. Now let us see, what has been stated by the Commission in regard to the principle of procurement on least cost basis which has been called in the electricity sector by name and style MOD.

The Commission vide para 7.1.2 of the Tariff Order No.1 of 2012 dated 30.3.2012 prescribed the Merit Order Ranking for dispatch of power by TANGEDCO on least

variable cost basis. And according to para 7.1.2 (f) of the Tariff order, the petitioner's plant is not covered under Merit order ranking since the variable cost of the Petitioner's plant was high i.e., Rs.11.15 per Unit during 2012-13. However, the Commission allowed the fixed cost for those IPPs listed therein including the Petitioner whose power was not scheduled as per MOD List. The Respondent has contended that the petitioner's plant has been given zero dispatch instruction since 01.04.2012 and that as and when power was required from the Petitioner's plant to meet the situation beyond the estimated demand, TANGEDCO obtained approval of the Commission in advance with proper justification. Only in case of emergency, TANGEDCO the first respondent, was permitted to approach the Commission within a week time of such action. The relevant provisions of the Tariff Order No. 1 of 2012 is as follows:-

“ 7.12.

xxxxxx

f. The fixed cost has been allowed for the Power Plants which are not scheduled as per Merit Order Dispatch shown above. These Power Plants are listed below:

i. NTPC-Eastern Region (NTPC-ER)

ii. PPN

iii. GMR

iv. Samalpatti

v. Madurai

g. The Merit Order Dispatch shown above has been considered assuming an idealistic scenario in which the energy is available from all the Power Plants listed in the Merit Order Ranking throughout the year. However due to corridor constraints, power flow from other regions may become difficult and other power plants may also get dispatched. Also

with lifting of R&C, the demand may increase and go beyond the estimates resulting in dispatch of other available sources. TANGEDCO shall follow the MOD and try to optimize the power purchase cost on the basis of Merit Order Ranking shown above. For traders, TANGEDCO is directed to take prior approval of the Commission before purchasing energy beyond the quantum and rate specified by the Commission for FY 2012-13 in this Tariff Order. ...”

11.8. It is clear from the above that the MOD as a concept has found its place in the statute books and the zero dispatch instruction is the ultimate effect of MOD and rather to say to precisely synonymous with MOD. It is because once the principle of MOD is given effect to, the zero dispatch instruction will be the necessary fall out. Hence the petitioner cannot be heard to say that there is no provision in the PPA for zero dispatch instruction. Further, the terms of the PPA are subordinate to the regulation 75 of the Tariff Regulation only.

11.9. It is further the contention of the respondent that the Petitioner's plant has to maintain the Zero despatch during the period in question unless specific scheduling out of Merit order is issued by the Respondent as per the above Order of the Commission and there are many precedences when the Respondent got approval/ratification from the Commission for purchasing of power outside the MOD ranking. The Commission has already approved the purchase of power beyond the MOD by the 1st respondent on many occasions, that too in between the period in question i.e., July2012 to June2013 viz., M.P.45 of 2012 dated 28.03.2013, M.P.47 of 2012 dated 28.03.2013, etc., to handle the situations like delay in commissioning of the ongoing power projects, lack of transmission corridor for purchase of outside region and heavy load shedding. It is a matter of record that in some instances,

TANGEDCO filed petitions before the Commission seeking exemption from MOD in view of power requirements and it also follows that the petitioner too could have approached the Commission with a petition against the zero dispatch instruction under section 33 (4) or challenge the vires of Regulation 75 of the Tariff Regulation which provides for MOD before the appropriate forum. However, this does not seem to have been done and the petitioner injected the power into the grid against the extant provisions of law. Such illegal injection of power has been deprecated by the Hon'ble APTEL in Indo-Rama's case which held that cost of such power need not be paid for.

11.10. In the instant case, it is to be noted that even though the Petitioner was issued with Zero dispatch during this period, the petitioner's plant continued to generate power and pump the same into the grid; the technical issue stated by the petitioner is that the plant has to be operated intermittently for 16 hours a day with a maximum continuous shutdown period of 4 hours at a time or otherwise no steam will be available to meet the requirement which will lead to solidification of fuel. But the petitioner states that the remedy on their hand is to supply the steam through the operation of the oil fired boiler to handle the issue during zero power; the plant has a 3 ton capacity oil fired Start-up boiler available at the plant which is meant for stop-gap arrangement / emergency use in case of a Black-start situation; this Boiler can be tried out a stop-gap measure for steam generation, but the reliability of the Boiler cannot be assured. Be that as it may, we are at a loss to understand as to why when the issue relating to technical minimum as a subject matter is pending before the Commission in D.R.P. No.27 of 2012, the power was pumped into the grid. It is also surprising as to why the said petition was withdrawn on 14-12-2018.

11.11. The Respondent has stated that the generating company, the petitioner was previously issued with zero dispatch for the continuous period of 959 hours during 17.07.2013 to 26.08.2013 during which the petitioner was able to handle the situation of fuel solidification without any untoward incident; and another generator M/s.GMR power corporation Limited which operates with similar type of fuel (LSHS) and which was also issued with Zero dispatch instructions, managed the technical problem arising out of zero dispatch instructions.

11.12. It is contended by the respondent that despite having a technical remedy of oil fired boiler to handle the steam generation, the petitioner is trying to project that the plant was not in a position to manage a situation of zero dispatch hours, but the fact is that the petitioner was able to handle zero dispatch situation on other occasions except in July2012 to June2013 alone. We find force in the argument of the respondent. In fact, the fact that the petitioner was able to manage the steam generation on some occasions has not been disputed by the petitioner. All that the petitioner is saying is that there is a need to maintain technical minimum. We are not convinced on this score. We are of the well considered view that unless the petitioner establishes beyond doubt that the steam generation could not be handled even once in the past during the time of zero dispatch instruction, the defence of technical minimum would not come to its rescue. Thus the petitioner has not demonstrated to the satisfaction of this Commission as to when such issuances of zero instructions had affected the plant. Moreover, as per the PPA terms, according to requirement, whenever a need arises, the plant can do start-stop exercise. Thus, in the absence of any specific clauses in the PPA to run the plant

continuously in order to avoid such technical problem, power injected into the grid continuously beyond the dispatch instructions, is impermissible.

11.13. The 1st Respondent further submits that the Merit Order dispatch regime came in and is scrupulously followed by the TANGEDCO and this event squarely falls under the Article 12 “Direct Indian Political Events under Force Majeure” specified in the Power Purchase Agreement. The Commission taking account of these terms had approved the Fixed charges to the Petitioner under Para 7.1.2.(f) of the Tariff Order dated 30.3.2012 and in Tariff order dated 20.6.2013, though these plants were not scheduled under MOD ranking. As stated supra, the MOD would override the PPA to the extent of the orders issued in the Tariff Order. Let us discuss the extent to which the petitioner is entitled to be paid for as per the Tariff Order in the next issue.

Issue – 2 :

Whether the power injected by the Petitioner during the period of zero dispatch instructions by the SLDC is entitled for payment as per agreed tariff and if so, to what extent?

11.14. In accordance with the Merit order ranking and power purchase quantum approved by the Commission in Tariff order dated 30.03.2012, the Petitioner’s plant was approved with “Zero” quantum; similarly in the Tariff order dated 20.6.2013 considering the variable cost of the plants, the Commission ranked the Merit order for scheduling of power to regulate the power purchase cost under Sec.86 of the Electricity Act 2003.

“2.215 Commission adopted the same approach to allow the costs in its Orders TO No 3 of 2010 and TO NO 1 of 2012. In the matter of the above mentioned orders, neither TANGEDCO nor the petitioners have raised any objections previously on the applicability of merit order principles to their plants.

2.216 Commission understands that the issue of finding alternative for meeting the heating requirement of fuel pipes and tanks etc in the event of Nil generation, is being taken up with the IPPs by TANGEDCO so as to strictly follow the Commission’s tariff order No. 1 of 2012 dated 30-3-2012 as submitted by TANGEDCO in the matter of petition MP No 23 of 2012.

2.217 In addition the matters concerned to payment obligations or applicability of Articles of a bilateral PPA are outside the purview of this petition. Hence the Commission decides that the power purchase quantum for the second control period from M/s SPCL and M/s MPCL will continue to be governed by Merit Order Despatch principles.

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2.219 MoD for the specific stakeholders viz M/s SPCL and M/s MPCL has been in vogue from 1st April 2012. No specific violation of PPA has been cited by them and a direction is being sought to follow the PPA. Alternatively a scheme of despatch is proposed. Section 32(2)(a) of E-Act 2003 states that “The State Load Despatch Centre shall - (a) be responsible for optimum scheduling and despatch of electricity within a State, in accordance with the contracts entered into with the licensees or the generating companies operating in that State;”

11.15. Though the petitioner has sought for the payment of the energy supplied during the unscheduled period, it is to be noted that the petitioner has not challenged the Tariff order or its MOD ranking approved by Commission. No court or forum has stayed its operation and therefore it reached finality. Even otherwise,

there is a provision in section 33 (4) to refer the dispute arising out of any direction issued by SLDC to the Commission and the petitioner could have approached the Commission at the earliest for adjudication rather than too late at this stage. The clause 2.215 of the Tariff Order makes it clear that no objection has been raised in the past to the MOD by any of the parties. Even the D.R.P. No.27 of 2012 which laid indirect challenge to the dispatch instructions has been subsequently withdrawn. More importantly, it is a matter of open record as stated in the para 2.216 of the Tariff Order that the issue of monitoring the plant in cases of Nil generation is not a new one and the same have been deliberated upon by IPPs and the TANGEDCO and hence, the impracticability or otherwise of maintaining the generation at Nil level cannot be the subject matter of this petition. As observed by the Commission, the matters concerning the payment obligation and application of PPA in regard to MOD are outside the purview of tariff petition and hence, the petitioner ought to have filed a petition in this regard much earlier and not raised an issue at this stage.

11.16. The State Load Despatch centre has the responsibility for optimum scheduling and despatch of power in line with the MOD approved by the Commission. Except the grid requirement or to manage the power situation of the State, the SLDC shall not deviate from the MOD; and any requirement beyond MOD shall be got approved by the Commission as stated in Para 2.218 of the said Tariff Order No. 1 of 2012.

11.17. While being so, under the Regulations of the Tamil Nadu Electricity Grid Code 2005, both the petitioner and the Respondents are responsible for scheduling and despatch –

“8. Scheduling and Despatch

(4) iii. The generating stations shall be responsible for power generation generally according to the daily schedule provided to them by the SLDC on the basis of the drawal schedules received from the beneficiaries /distribution licensee and also in accordance with Merit Order Despatch and Connectivity Agreements. However, the generating stations may deviate from the given schedules depending on the plant and system conditions with the prior approval from SLDC.”

11.18. We agree with the view that the SLDC has responsibility for real time function for balancing the dynamically varying supply and demand at any moment in the interconnected system as per IEGC 2010; and the vital grid parameters such as frequency, node voltages, transmission line loading, transformer loading, etc., are also monitored round the clock and acted suitably. The scheduling of power is made by the SLDC in line with the above permissible bands.

11.19. Further, we find that the SLDC has to restrict the Tamil nadu Unscheduled Interchange within the limits of 250 MW as notified by the CERC and grid security cannot be maintained at all if all the generators continuously pumping energy to TN Grid over and above the contracted quantum/drawal schedule / despatch instructions of SLDC; and it is acceptable to us that violation to the RLDC (SRLDC) even a meager quantum of 1 MW of power injected by the generators by violating SLDC instructions will endanger the Tamil Nadu Grid and will result in commercial

implications to the Respondent. While being so, in respect of the petitioner's excess injection of power during the period of zero despatch, the petitioner cannot be heard to say that the Respondent has to go for ratification before the Commission.

11.20. The Respondents during the period in question i.e., July 2012 to June 2013, in many occasions obtained prior approval as well as ratification approval for scheduling of power from high cost power plants outside the MOD ranking including the Petitioner M/s.Samalpatti Power Corporation limited. Since, the Respondents have frequently approached, for every requirement of scheduling beyond MOD, the Commission approved the same in line with the Tariff order of the Commission after expressing due concern on such ratification.

11.21. It is also important to note that following Hon'ble APTEL order dated 8.5.2017 in A.No.120 of 2016 & IA no.272 of 2016, in which it has been held as follows –

“.... The crux of these two judgments is also that a generator cannot pump electricity into the grid without having consent / contractual agreement with the distribution licensee and without the approval / scheduling of the power by the SLDC. Injection of such energy by a generator is not entitled for any payments”.

The Hon'ble Supreme Court of India, also in its Civil Appeal no.13335-13336 of 2015 and Civil Appeal no.4417 of 2016 dismissed the appeals filed against the orders of the Hon'ble APTEL rejecting the payment for unauthorized injection of power into the grid. The Hon'ble Supreme Court in such cases held as follows:-

“Heard the learned counsel appearing the appellant(s).

We do not find any reason to interfere with the impugned orders dated 29.11.2014 and 15.4.2015 passed by the Appellate Tribunal for Electricity, New Delhi. In view of this, we find no merit in the appeals. Accordingly, the Appeals are dismissed.”

From the above, it is clear that the power pumped into the grid without the approval of SLDC or the distribution licensee is not entitled for payment.

11.22. The ‘zero’ dispatch instruction issued by SLDC to the Petitioner’s power plant under Merit Order Ranking of the Commission’s Tariff Order does not amount to violation of the PPA for the reason that it has the sanction of Regulation 75 of the Tariff Regulations which has got statutory force of law and the same is independent of PPA. Any direction given on the strength of such regulation cannot be disobeyed or circumvented by illegal injection on the ground of technical minimum. If at all there is technical impracticability, the right course of action is to challenge the regulation 75 or seek remedy before the Commission for modification of MOD with reference to technical minimum. However, we find that the same has not been done and the petitioner has glaringly failed to adhere to the provisions of law.

11.23. It is further relevant to refer to Tamil Nadu Electricity Grid Code dated 10.12.2005 issued by the Commission provides as follows:

“Clause 10 : Non compliance and disputes- (1) As stipulated under Section 33 (2), (4) and (5) of the Act, every licensee, generating company, generating station, substation and any other person connected with the operation of the power system shall comply with the directions issued by SLDC. If any dispute arises with reference to the quality of electricity or safe, secure and integrated operation of the State Grid or in relation to any direction given by SLDC, it shall be referred to the

Commission for decision. Pending decision of the Commission the licensee or the generating company shall comply with the directions of the SLDC.....”

It is to be observed here that the petitioner seeks to interlink the start-stop instruction as provided in the PPA and the zero dispatch instruction arising out of the MOD. We find that the term zero dispatch instruction is a misnomer and it could have been titled otherwise for the reason that the petitioner has preferred the claims based on such misnomer assigned to the curtailment instruction in the name and style of zero dispatch instruction. It is to be made clear that the instruction under challenge derives authority from section 75 of the Tariff Regulation which requires scheduling of power on least cost basis while the start-stop instructions relate to operational difficulty in the Grid requiring ceasing of generation. The distinction between the instruction arising out of operational exigency and the instruction arising out of the need to procure power on least cost basis needs to be understood. However, there is always option to lay challenge to MOD on other grounds statutorily but not on the strength of the provision of the PPA which have to give way to a statutory regulation such as regulation 75 until such its validity is untested and remains in the regulatory frame work.

11.24. As per the provisions of the Grid Code of this TNERC, if the Petitioner is aggrieved by Zero power dispatch instructions of SLDC, it ought to have approached the Commission after obeying the dispatch instructions of SLDC or raised the matter before the Commission immediately thereafter. But, without obeying dispatch instructions of SLDC, this Petitioner has approached the Commission and hence the claim of the petitioner does not merit consideration.

Since the petitioner has not approached the Commission at the earliest for relief, it is disentitled from claiming any equity in its favour.

The petitioner, being a generating company and a vital player in the electricity sector ought to have seen that the act of injecting power without the approval of the SLDC could result in instability to the grid may even cause the collapse of the grid. If at all, there was technical difficulty, nothing prevented the company from approaching the Commission at the earliest. The Commission cannot grant *expost facto* approval to such blatant acts of illegal injection.

11.25. For the foregoing reasons, we find no merit in the claim of the petitioner.

In the result, the petition is dismissed. No costs.

(Sd.....)
(K.Venkatasamy)
Member (Legal)

(Sd.....)
(M.Chandrasekar)
Chairman

/True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission